FIFTH REPORT

FROM

HER MAJESTY'S COMMISSIONERS

FOR

REVISING AND CONSOLIDATING

THE

CRIMINAL LAW.

Appointed the 22nd day of February 1845.

Presented to both Houses of Parliament by Command of Her Majesty.

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET,
FOR HER MAJESTY'S STATIONERY OFFICE.

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1849.

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COMMISSION.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To Our right trusty and well-beloved Councillor *Sir Edward Ryan*, Knight, and Our trusty and well-beloved *Thomas Starkie*, *Robert Vaughan Richards*, *Henry Bellenden Ker*, and *Andrew Amos*, Esquires, Greeting; WHEREAS His late Majesty King William the Fourth did, by his Letters Patent bearing date the Twenty-third day of July, in the Fourth year of His Reign, appoint you the said Thomas Starkie, Henry Bellenden Ker, and Andrew Amos, together with William Wightman and John Austin, Esquires, to be His Commissioners for the purpose (amongst other things) of digesting into one Statute all the Statutes and Enactments touching Crimes, and the trial and punishment thereof, and also digesting into one other Statute all the provisions of the Common or unwritten Law touching the same, and for the purpose of inquiring and reporting how far it might be expedient to combine both these Statutes into one Body of the Criminal Law, repealing all other Statutory Provisions, or how far it might be expedient to pass into a Law the first mentioned only of the said Statutes: And whereas His said late Majesty did, by His Letters Patent, bearing date the Twenty-first day of October, in the Seventh year of His Reign, after revoking and determining the said first hereinbefore recited Letters Patent, appoint you the said Thomas Starkie, Henry Bellenden Ker, and Andrew Amos, and the said William Wightman, together with David Jardine, Esquire, to be His Commissioners for the purposes aforesaid: And whereas We did by Our Letters Patent, bearing date the Twenty-sixth day of October, in the First year of Our Reign, after revoking and determining the said lastly hereinbefore recited Letters Patent of His said late Majesty, appoint you the said Thomas Starkie, Henry Bellenden Ker, and Andrew Amos, and the said William Wightman and David Jardine, to be Our Commissioners for the purposes aforesaid: And whereas the said Commissioners have from time to time, in obedience to the said several recited Letters Patent, made Reports containing, amongst other things, a Digest of the written and unwritten Law relating to the definition of Crimes and Punishments, accompanied by suggestions for such partial alterations as they considered to be necessary, and are about to make a Report on Criminal Procedure, with a Digest of the existing Law relating thereto: NOW KNOW YE, That We have revoked and determined, and by these Presents do revoke and determine Our said recited Letters Patent, and every Clause, Article, and thing therein contained: And further KNOW YE, That We, reposing great trust and confidence in your zeal and ability, have authorized and appointed, and by these Presents do authorize and appoint you the said Thomas Starkie and Henry Bellenden Ker to complete the said Report on Criminal Procedure, with a Digest of the Law relating thereto, and you the said Sir Edward Ryan, Thomas Starkie, Robert Vaughan Richards, Henry Bellenden Ker, and Andrew Amos, or any Three or more of you, to be Our Commissioners for the purpose of considering the said Reports and the alterations therein suggested, and the expediency of consolidating into one or more Statute or Statutes, agreeably to the Digest contained in such Reports,

or with any and what alterations and additions, the whole or any part or parts of the Criminal Law, as well written as unwritten, and for preparing the Draft of a Bill or Bills for that purpose, and further for inquiring into and reporting separately respecting such Statutes or parts of Statutes relating to Criminal matters as in your opinions ought to be repealed, and for preparing the Draft of a Bill or Bills for that purpose: And for the better effecting the purposes of this Our Commission by you the said Sir Edward Ryan, Thomas Starkie, Robert Vaughan Richards, Henry Bellenden Ker, and Andrew Amos, We do by these Presents give and grant to you the said Sir Edward Ryan, Thomas Starkie, Robert Vaughan Richards, Henry Bellenden Ker, and Andrew Amos, or any Three or more of you, full power and authority to call before you, or any Three or more of you, such Persons as you shall judge necessary, by whom you may be the better informed on the subject of this Our Commission, and every matter connected therewith, and also to call for, have access to, and examine all such official Books, Documents, Papers, and Records as may afford the fullest information on the subject, and to inquire of and concerning the premises by all other lawful ways and means whatsoever: And We do hereby give and grant to you the said Sir Edward Ryan, Thomas Starkie, and Robert Vaughan Richards, Henry Bellenden Ker, and Andrew Amos, or any Three or more of you, full power and authority, when the same shall appear to be requisite, to administer an Oath or Oaths to any Person or Persons whatsoever to be examined before you, or any Three or more of you, touching or concerning the premises: And Our further will and pleasure is, that you the said Sir Edward Ryan, Thomas Starkie, Robert Vaughan Richards, Henry Bellenden Ker, and Andrew Amos, or any Three or more of you, do and shall certify to Us in Our Court of Chancery, on Parchment, under your Hands and Seals respectively, your several proceedings in this matter, as the same shall be respectively completed and perfected: And We will and command, and by these presents ordain, that this Our Commission shall continue in full force and virtue, and that you the said Sir Edward Ryan, Thomas Starkie, Robert Vaughan Richards, Henry Bellenden Ker, and Andrew Amos, or any Three or more of you, may from time to time proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment: And We hereby command all and singular Our Justices of the Peace, Sheriffs, Mayors, Bailiffs, Constables, Officers, Ministers, and all other Our loving subjects whatsoever, as well within Liberties as without, that they be assistant to you and each of you in the execution of these presents: And for your assistance in the due execution of this Our Commission, We have made choice of Our trusty and well-beloved *James John Lonsdale,* Esquire, Barrister-at-Law, to be Secretary to this Our Commission, and to attend you, whose service and assistance We require you to use from time to time as occasion may require. In Witness whereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster, the Twenty-second day of February, in the Eighth year of Our Reign.

By Writ of Privy Seal,

EDMUNDS.

FIFTH REPORT.

TO THE QUEEN'S MOST EXCELLENT MAJESTY, IN HER HIGH COURT OF CHANCERY.

We, Your Majesty's Commissioners, appointed by Your Majesty's Commission bearing date the 22nd day of February, in the eighth year of Your Majesty's reign, whose hands are hereunto set, in presenting this our Fifth Report to your Majesty, humbly beg to observe that having been deprived by death of the valuable assistance of our late lamented colleague, Thomas Starkie, Esq., when considerable progress had been made in the preparation of that Report, whereby the members of Your Majesty's Commission were reduced below the number empowered to act under it, we were authorized by Sir George Grey, one of Your Majesty's Principal Secretaries of State, in a letter dated the 27th of April last, to complete this our present Report; we have, therefore, in compliance with this authority proceeded to complete the same, and do now humbly submit it to Your Majesty. Our present Report contains the revision of the Digest of the Law of Procedure in respect of indictable offences, referred to our consideration by Your Majesty's Commission, and the draft of a Bill, also prepared in obedience to Your Majesty's Commission, for the purpose of consolidating into one statute the various provisions of such Digest. The mode in which this has been done is by inserting such provisions by way of Schedule to the draft Bill, according to the course adopted in the case of the proposed Act of Crimes and Punishments. Where the existing law has been modified, we have, as on former occasions, appended notes to particular Articles of the Schedule to the Bill, indicating the fact and the nature of the modification. Where the subjects to which the Articles relate have been discussed by the former Commissioners whose reports are referred to our consideration, reference has been made to the reports in which those discussions are contained; and, where it has been thought necessary, the sentiments of the present Commissioners respecting the proposed modifications have been expressed.

We have framed some important alterations of the law as to the drawing of indictments, with a view to the avoidance of those flaws which have afforded so great a scandal to the administration of criminal justice in this country, and also to the curtailing of prolixity. We have also proposed considerable alterations in the law as regards the granting of warrants by justices of the peace, the attendance and examination of an accused person's witnesses before a justice of the peace, the binding over of infants and married women to prosecute &c., grand juries, juries and jury process, pleas of autrefois acquit, juries of matrons, costs of prosecutions, and other matters of less general consequence.

We have also proposed that Coroners' Inquisitions should no longer be used as a mode of formal charge, and that the power at present possessed by a coroner of committing for trial any person against whom a verdict of murder or manslaughter shall have been found before him, should be abolished, and that henceforth the coroner should only have authority to issue a warrant for

the purpose of taking such a person before a magistrate for examination. We have also suggested the abrogation of the law of "hue and cry," that primitive course of proceeding having been rarely resorted to in recent times, and being unsuited to modern habits.

Owing to the death of Mr. Starkie we have not felt ourselves justified in framing further important changes in the fundamental principles of the law, respecting which considerable difference of opinion existed between him and the other Commissioners, and which, indeed, did we feel that we could confidently recommend, it would have been impracticable for us to embody in a shape to be passed by the Legislature within any reasonable limits of time contemplated by the authority contained in the letter before alluded to from one of Your Majesty's Principal Secretaries of State.

We deem it proper to state that we have derived important assistance from W. S. Jones, Esq., Master of the Crown side of the Court of Your Majesty's Bench, in framing those portions of the Digest which relate to proceedings after an indictment found or information filed to compel appearance to answer, and procuring the attendance of jurors at trials, and other matters in which his practical experience has been found of great utility in the accomplishment of the difficult duties intrusted to us.

Having now concluded the task assigned to us, we think it proper to mention that an important part of the recommendations of the former and of the present Commissioners has already become the law of the land; for which we beg to refer more particularly to the Acts passed in the first year of Your Majesty's reign, whereby secondary punishments were substituted for the punishment of death in by far the greater number of cases in which capital punishment might then be inflicted; to the Acts also of Your Majesty's reign for abolishing the punishment of the pillory; for relieving Your Majesty's Roman Catholic and other subjects from penalties and disabilities in regard to religious opinions; and for the more speedy trial and punishment of juvenile offenders; and to the Act passed in the seventh year of the reign of His late Majesty King William IV., for the allowance to prisoners of full defence by counsel in cases of felony. We trust that the recommendations contained in the Report on the subject of juvenile offenders may be still further carried out than has already been done, and that some one of the plans for consolidating the general statute law contained in the Report on that subject made by the former Commissioners may be carried into effect.

With regard to the immediate subject of the Digests framed by us of the substantive Criminal Law and the Law of Criminal Procedure, we hope that much has been done which will be useful for rendering the law more accessible to the community, and for affording assistance to the Legislature in enacting any new laws relative to crimes, even so far as those Digests may be regarded merely as a consolidation of the existing law. Various alterations have been proposed in the principles of the existing law, which, if they be deemed inexpedient by the Legislature, will not have the effect of impairing the general utility of the Digests, but which we think may be deemed deserving of the attentive consideration of the Legislature in connexion with any measure for promulgating the Criminal Law in a compendious and at the same time a comprehensive form.

We now proceed to submit to Your Majesty the Draft Bill for Consolidating and Amending the Law of Procedure in respect of Indictable Offences:—

DRAFT OF A BILL,

INTITULED

"An Act for Consolidating and Amending the Law of Procedure in respect of Indictable Offences."

BE it enacted, &c.,

1. THAT the Schedule to this Act annexed shall be deemed and taken to be parcel of this Act, and that the Analysis and all the Chapters of such Schedule, and all the Sections of such Chapters, and all the Articles of such Sections and the Headings and Numbers thereof, respectively, shall be deemed and taken to be enacted by this present Act, as if such Analysis and every of such Chapters, Sections, Articles, Headings, and Numbers had been expressly and in terms herein recited, with the usual words and in the usual forms of enactment, or declaration, or proviso, as the case may be.

2. THAT after the passing of this Act the process of hue and cry shall cease and be abolished; and it shall no longer be lawful to try any person upon a coroner's inquisition, or for any coroner to commit for trial any person against whom any verdict of murder or manslaughter, or of being accessory to any murder, shall be found by the jury at any inquest holden before such coroner.

3. THAT after the passing of this Act it shall no longer be lawful where a female offender shall upon a capital conviction allege, or the Court shall otherwise have reason to suppose, that she is pregnant, to empanel a jury of matrons to try whether or not she be quick with child.

General saving clause.

4. THAT nothing in this Act contained shall be deemed in any way to affect or alter any authority of Her Majesty's Privy Council or Principal Secretaries of State, or of either of the Houses of Parliament, in respect of any offence, or to affect the trial of any peer or peeress in Parliament, or any impeachment or other proceedings therein, or any summary proceedings in respect of any contempt against either House of Parliament or any court of justice; or to repeal or alter the provisions of an Act passed in the Session of Parliament holden in the 4th and 5th years of the reign of King William IV., intituled "An Act for establishing a new Court for the trial of Offences committed in the Metropolis, and parts adjoining (*a*);" or to alter or affect the power and authority given by an Act passed in the Session of Parliament holden in the 2nd and 3rd years of Her present Majesty's reign, intituled "An Act for enabling Justices of Assize and Nisi Prius, Oyer and Terminer, and Gaol Delivery, to hold Courts for Counties at large in adjoining Counties of Cities and Towns, and conversely;" or to alter or affect any of the powers, provisions, or enactments contained in an Act passed in the 10th year of the reign of King George IV., intituled "An Act for improving the Police in and near the Metropolis," or in an Act passed in the 3rd year of the reign of Her present Majesty, intituled "An Act for further improving the Police in and near the Metropolis," or in an Act passed in the same year of the reign of Her present Majesty, intituled "An Act for regulating the Police Courts in the Metropolis," or in an Act passed in the 4th year of the reign of Her present Majesty, intituled "An Act for better defining the Powers of Justices within the Metropolitan Police District;" or to take away or diminish the jurisdiction of either of the supreme criminal Courts in the counties palatine of Lancaster and Durham, but that such jurisdiction shall and may be exercised as it had before the making of this Act of right been exercised, but subject, as regards the manner of exercising such jurisdiction, to such provisions in this Act contained as are applicable to the exercise of such jurisdiction in like manner as the same are made expressly applicable to the administration of criminal justice in parts of England other than in counties palatine; or to repeal, abolish, or alter any existing rule or practice of, in, or relating to any criminal Court now existing, and which may be necessary or useful for the carrying of the provisions of the Act of Crimes and Punishments, or of this Act, into effect, and which is not inconsistent with any provision contained in this Act.

4 & 5 Will. IV., c. 36.

2 & 3 Vic., c. 72.

Nothing to affect powers, &c., contained in 10 Geo. IV., c. 44; 2 & 3 Vic., c. 47; 2 & 3 Vic., c. 71; and 3 & 4 Vic., c. 84.

Counties palatine.

As to the existing practice.

(*a*) It has appeared to us that it would be inconvenient to insert the numerous provisions of the Act referred to (4 and 5 Will. IV. c. 36), the operation of which is local, into a general Act concerning procedure. As the provisions in the former Act are peculiar to the structure of the new court, they could not be incorporated in the general provisions of the Act of Procedure, and the mere addition of the several clauses of the Central Criminal Court Act would be attended with considerable inconvenience, and without any advantage beyond that of mere annexation.

New rules or practice.

5. THAT where any new rule or practice, or the alteration of any rule or practice of any criminal Court shall be necessary for the carrying the provisions of this Act into effect, it shall be competent to such Court to establish such rule, practice, or alteration; provided that, as regards Courts of session of the peace, or other inferior Courts in which no judge of any of the superior Courts at Westminster shall preside, the sanction of two of such judges shall be necessary for the establishment of any such rule, practice, or alteration.

6. THAT this Act shall not extend to Scotland or Ireland, except where expressly mentioned.

7. THAT this Act may be repealed, altered, or varied, at any time within this Session of Parliament.

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SCHEDULE TO WHICH THIS ACT REFERS.

[N.B.—The Act of Procedure referred to in the Notes in this Report is contained in the Eighth Report of the Criminal Law Commissioners; and the Act of Crimes and Punishments referred to in any Article in this Report is contained in the Fourth Report of the Commissioners for Revising and Consolidating the Criminal Law.]

CHAPTER I.

Proceedings before an Indictment Found.

SECTION 1.

Of a Summons or Warrant of Arrest.

Art. 1.

Where a crime punishable under any of the provisions of the Act of Crimes and Punishments (*a*) has been committed, or is suspected to have been committed, the proceeding, in order to compel the party known or suspected to have committed such crime, to appear for the purpose of preliminary inquiry concerning the same, may be by summons or by arrest.

(*a*) Various Acts contain provisions for regulating the proceedings in respect of offences punishable on summary conviction; but these provisions have not been inserted in the present Digest, as it relates solely to indictable crimes.

Art. 2.

An arrest in criminal procedure is the taking of the body of a party into custody in order that he may be forthcoming to answer a criminal charge against him; and may be either—

1. By virtue of a warrant.
2. By a person, not being a peace officer, without warrant.
3. By a peace officer without warrant.

Art. 3.

A summons or a warrant of arrest may be issued in the cases and shall be subject to the rules hereinafter in this Section contained.

Art. 4.

For what offences a justice of the peace may grant a warrant or summons, to cause a person charged therewith to be brought before him.

Where a charge or complaint (A.) shall be made before a justice of the peace for any county that any person has committed, or is suspected to have committed, any crime within the limits of the jurisdiction of such justice, or that any person guilty or suspected to be guilty of having committed any crime elsewhere out of the jurisdiction of such justice is residing, or being or is suspected to reside or be within the limits of the jurisdiction of such justice, then and in every such case, if the person so charged or complained against shall not then be in custody, it shall be lawful for such justice to issue his warrant (B.) to apprehend such person, and to cause him to be brought before such justice or any other justice for the same county to answer to such charge or complaint, and to be further dealt with according to law. (*b*)

(*b*) 11 & 12 Vic. c. 42, s. 1, in part.

Art. 5.

In what cases the party may be sum-

Provided that, [in cases of misdemeanor, (*c*) where the person so charged or complained against, as in the last preceding Article is mentioned, shall be within

Chap. I. Sec. 1.

moned instead of issuing a warrant in the first instance.

the jurisdiction of the justice to whom such charge or complaint shall be preferred, such justice, unless it shall be shown to his satisfaction that such person is likely to go out of his jurisdiction, shall,] and in all other cases may, if he shall so think fit, issue his summons (C.), directed to such person, requiring him to appear before such justice at a time and place to be therein mentioned, or before any other justice for the same county who may then be there, instead of issuing in the first instance his warrant to apprehend the person so charged or complained against;

If the summons be not obeyed, then a warrant may be issued.

and if after being served with such summons in manner hereinafter in Article 34 of this Section mentioned, he shall fail to appear at such time and place in obedience to such summons, then and in every such case such justice, or any other justice for the same county, may issue his warrant (D.) to apprehend such person so charged or complained against, and cause such person to be brought before him or any other justice for the same county to answer to such charge or complaint, and to be further dealt with according to law. (*d*)

(*c*) Justices of the Peace are frequently in doubt with respect to choosing whether they should grant a summons or a warrant. It seems expedient to afford some directions on this subject, upon which they have no authority to guide them, and which would otherwise occasion further perplexity, in consequence of the ancient distinctions between felonies and misdemeanors being materially altered by the Act of Crimes and Punishments. In this view the words between brackets have been introduced.

(*d*) 11 & 12 Vic. c. 42, s. 1, in part.

Art. 6.

Provided that nothing in the last preceding Article contained shall prevent any justice of the peace from issuing the warrant in Article 4 mentioned at any time before or after the time mentioned in such summons for the appearance of the accused party. (*e*)

(*e*) 11 & 12 Vic. c. 42, s. 1, in part.

Art. 7.

Term "county," how to be understood in this Chapter.

Wheresoever in any Article of this Chapter the term "county" is used, such Article is to be read as if the words "county, riding, division, liberty, city, borough, or place" had been therein used instead of that term, unless where any other of those words is used in the same Article together with that term, or where that term is used in reference to Scotland or Ireland, or unless there be something in the subject or context repugnant thereto, in which cases it is to be understood in its ordinary sense.

Art. 8.

Warrant to apprehend for offences committed on the high seas or abroad.

Where a crime has been committed, or is suspected to have been committed on the high seas, or in any other place within the jurisdiction of the Admiralty of England, and where a crime has been committed, or is suspected to have been committed on land beyond the seas, [or partly on the high seas or in any other place within the jurisdiction of the Admiralty of England or on land beyond the seas, and partly within the body of any county in England (*f*)] for which an indictment may legally be preferred in any place within England, it shall be lawful for any justice of the peace for any county in England in which any person charged with having committed or with being suspected to have committed any such crime shall reside or be, or shall be supposed or suspected to reside or be, to issue his warrant (E.) to apprehend the person so charged, and to cause him to be brought before him or any other justice for the same county to answer to such charge, and to be further dealt with according to law. (*g*)

(*f*) These words, perhaps, render Article 12 unnecessary.

(*g*) 11 & 12 Vic. c. 42, s. 2.

Art. 9.

Offences committed at foreign ports to be deemed to have been committed on the high seas.

All offences against the property or person of any subject of Her Majesty or of any foreigner, which shall be committed in or at any port or place, either ashore or afloat, out of the dominions of Her Majesty, by the master and crew (including apprentices) or any or either of them, belonging to any ship subject to any of the provisions of an Act passed in the Session of Parliament, holden in the 7th & 8th years of Her present Majesty's reign, intituled "An Act to Amend and Conso- "lidate the Laws relating to Merchant Seamen, and for keeping a Register of "Seamen," or who within three months before the committal of the offence shall

have been the master thereof or shall have formed part of any such crew, shall be deemed to have been committed on the high seas. (*h*)

(*h*) 7 & 8 Vic. c. 112, s. 58, in part.

ART. 10.

What places within the Admiralty jurisdiction.

The Admiralty of England have jurisdiction within the meaning of Article 8 of this Section, upon the open sea-shore, between high and low-water mark, so long as the shore is covered by the tide. (*i*)

(*i*) 3 Inst. 113; 2 Hale's P. C. 17; Hawk. P. C. b. 2, c. 9, s. 14.

ART. 11.

Parts of rivers, arms of the sea and creeks, where a man standing on one side of the land may see what is done on the other, are not within the Admiralty jurisdiction, but within the bodies of counties. (*j*)

(*j*) This is the rule laid down by Hawkins, (b. 2, c. 9, s. 13,) and agrees with what is laid down by L. Coke in the Admiralty Case, 13 Co. 52.

ART. 12.

Where hurt out of England, death in England.

Where any person being [maliciously or negligently] stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England, shall die of such stroke, poisoning, or hurt in England, or being [maliciously or negligently] stricken, poisoned, or otherwise hurt at any place in England, shall die of such stroke, poisoning, or hurt, upon the sea or at any place out of England, it shall be lawful for any justice of the peace for any county in England in which such death, stroke, poisoning, or hurt shall happen, to issue his warrant to apprehend any person charged with having committed or with being suspected to have committed any offence in respect of any such case, whether the same shall amount to a crime against any Article of Sections 2, 3, and 4 of Chapter XV. of the Act of Crimes and Punishments, or to the offence of being accessory to any such crime, or of preventing or endeavouring to prevent the arrest of any person who has committed any such crime, or of facilitating or endeavouring to facilitate his escape from justice, in the same manner, in all respects, as if such offence had been wholly committed in that county. (*k*)

(*k*) 9 Geo. IV. c. 31, s. 8. The words between brackets are substituted for the word "feloniously," in consequence of the term "felony" being used in the Act of Crimes and Punishments only as denoting such crimes as are punishable with transportation. The words substituted describe the only hurts which where death ensues constitute criminal homicide according to the definition in the Act of Crimes and Punishments.

ART. 13.

Principals, where acts constituting offence are done at different places.

Where a party shall be a principal, or several parties shall be principals, in the commission of any offence by reason of acts done or consequences which have occurred at different places not included within the same county, it shall be lawful for any justice of the peace for any county in which any such act shall have been done, or in which any such consequence shall have occurred, to issue his warrant to apprehend any such party in the same manner, in every respect, as if such acts had been all done or such consequences had all occurred in that county. (*l*)

(*l*) The above Article renders unnecessary the insertion of an Article embodying the provisions of 2 Will. IV. c. 34, s. 15 (the Coin Consolidation Act).

ART. 14.

Accessories, where out of jurisdiction of justice and offence committed out of his jurisdiction.

Any justice of the peace who has authority to apprehend the principal offender may issue his warrant to apprehend an accessory, although such accessory shall not be within the ordinary jurisdiction of such justice, nor his offence have been committed, either wholly or in part, therein. (*m*)

(*m*) See 7 Geo. IV. c. 64, s. 9.

ART. 15.

Where offence committed on boundary of county.

Where any offence shall be committed on the boundary or boundaries of two or more counties, or within the distance of 500 yards of any such boundary or boundaries, or shall be begun in one county and completed in another, it shall be lawful for any justice of the peace for any of such counties to issue his warrant to apprehend any person charged with having committed or with being suspected to

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have committed any such offence, in the same manner as if it had been actually and wholly committed in that county. (*n*)

(*n*) See 7 Geo. IV. c. 64, s. 12.

ART. 16.

The 500 yards are to be measured in a direct line from the boundary. (*o*)

(*o*) R. *v.* Wood, 5 Jur. 225. Harrison's Digest, 7171.

ART. 17.

During journey, &c.

Where any offence shall be committed on any person, or on or in respect of any property in or upon any coach, waggon, cart, or other carriage whatsoever employed in any journey, or shall be committed on any person, or on or in respect of any property on board any vessel whatsoever employed on any voyage or journey upon any navigable river, canal, or inland navigation, it shall be lawful for any justice of the peace for any county through any part whereof such coach, waggon, cart, carriage, or vessel shall have passed in the course of the journey or voyage during which such offence shall have been committed, to issue his warrant to apprehend any person charged with having committed or with being suspected to have committed any such offence, in the same manner as if it had been actually committed in such county; and in all cases where the side, centre, or other part of any highway, or the side, bank, centre, or other part of any such river, canal, or navigation, shall constitute the boundary of any two counties, it shall be lawful for any justice of the peace for either of such counties through or adjoining to or by the boundary of any part whereof such coach, waggon, cart, carriage, or vessel shall have passed in the course of the journey or voyage during which such offence shall have been committed, to issue his warrant to apprehend any person charged with having committed or with being suspected to have committed any such offence, in the same manner as if it had been actually committed in such county. (*p*)

(*p*) See 7 Geo. IV. c. 64, s. 13.

ART. 18.

Post Office.

Where an offence shall be committed in or upon or in respect of a mail, or upon a person engaged in the conveyance or delivery of a post letter-bag or post letter, or in respect of a post letter-bag or post letter, or anything sent by the post, it shall be lawful for any justice of the peace for any county through any part whereof the mail, or the person or the post letter-bag or the post letter or the thing sent by the post, in respect of which the offence shall have been committed, shall have passed in due course of conveyance or delivering by the post, to issue his warrant to apprehend any person charged with having committed or with being suspected to have committed such offence, in the same manner as if it had been actually committed in such county; and in all cases where the side or the centre or other part of a highway, or the side, the bank, the centre or other part of a river, or canal, or navigation shall constitute the boundary of two counties, it shall be lawful for any justice of the peace for either of such counties through which or adjoining to which, or by the boundary of any part of which, the mail or person shall have passed in due course of conveyance or delivery by the post, to issue his warrant to apprehend any person charged with having committed or with being suspected to have committed such offence in the same manner as if it had been actually committed in such county. (*q*)

(*q*) See 7 Will. IV. & 1 Vic. c. 36, s. 37, in part.

ART. 19.

Offender having stolen property in one part, having it in possession in any other part of the United Kingdom.

Where any person having stolen (*r*) any thing in any part of the United Kingdom out of England, shall afterwards have the same thing, or any part thereof, in his possession in England, it shall be lawful for any justice of the peace for any county in England in which such person shall so have such thing or any part thereof in his possession, to issue his warrant to apprehend him for theft in the same manner as if he had actually stolen such thing in England; and if any person in England shall receive or unlawfully have in his possession or keeping any thing, or any part thereof, which shall have been stolen in any other part of the United Kingdom, such person knowing such thing to have been stolen, it shall be lawful for any justice of the peace for any county in England in which

such person shall so receive or have possession or keeping of such thing, to issue his warrant to apprehend him, in the same manner as if such thing had been originally stolen in England. (*s*)

(*r*) The words of the Act are "stolen or otherwise feloniously taken."
(*s*) See 7 & 8 Geo. IV. c. 29, s. 76.

Art. 20.

Receivers of stolen property.

Where any person shall, contrary to the provisions of Article 1 of Section 5 of Chap. XVIII. of the Act of Crimes and Punishments, receive, or have in his possession or keeping, any thing which shall have been stolen or obtained by any false pretence, or which shall have been embezzled, knowing the same to have been so stolen, obtained, or embezzled, it shall be lawful for any justice of the peace for any county in which the party guilty of having so stolen, obtained, or embezzled the same may by law be tried, to issue his warrant to apprehend the person who shall have so received or had possession or keeping of such thing in the same manner as if he had actually received or had possession or keeping of it in such county. (*t*)

(*t*) See 7 & 8 Geo. IV. c. 29, s. 56. So much of 7 & 8 Geo. IV. c. 29, s. 56, as gives power to deal with receivers in any county where they have or have had the property stolen, &c., in the same manner as if they had actually received it in such county, is now rendered unnecessary by the extension in the Act of Crimes and Punishments of the offence of receiving to the *unlawfully having in possession or keeping* of property which has been stolen, &c.

Art. 21.

A warrant of arrest may be granted or issued on a Sunday as well as on any other day. (*u*)

(*u*) 11 and 12 Vict. c. 42, s. 4, in part.

Art. 22.

Boroughs.

No part of any borough in and for which a separate court of quarter sessions of the peace shall be holden shall be within the jurisdiction of the justices for any county from which such borough was exempt before the passing of an Act of the Parliament holden in the 5th and 6th years of the reign of King Wm. IV., intituled "An Act to provide for the Regulation of Municipal Corporations in England and Wales." (*v*)

(*v*) 5 & 6 Will. IV. c. 76, s. 111.

Art. 23.

Justices for adjoining counties, &c., may act as such for one county, &c., while residing in another.

All Acts of Justices, &c., to be valid.

Where a justice of the peace for any county shall be also justice of the peace for a county next adjoining thereto or surrounded thereby, it shall and may be lawful for such justice to act as such justice for the one county whilst he is residing or happens to be in the other such county in all matters and things in this Chapter mentioned; and all such acts of such justice, and the acts of any peace officer in obedience thereto, shall be as valid, good, and effectual in the law to all intents and purposes as if such justice at the time he shall so act were in the county for which he shall so act; and all peace officers for the county for which such justice shall so act are hereby required to obey the warrants, orders, directions, act or acts of such justice which in that behalf shall be granted, given, or done, and to do and perform their several offices and duties in respect thereof, under the pains and penalties to which any peace officer may be liable for a neglect of duty; and any such peace officer, or any other person, apprehending or taking into custody any person offending against the law, and whom he lawfully may and ought to apprehend or take into custody by virtue of his office or otherwise in any such county, may lawfully take and convey such person so apprehended and taken to and before any such justice of the peace for such county whilst such justice shall be in such adjoining county; and such peace officers, and all such other persons, are hereby required in all such cases so to act in all things as if such justice were within the county for which he shall so act. (*w*)

Constables, &c., apprehending offenders in one such county, &c., may take them before such justice in the adjoining county, &c., if he act as a justice in both.

(*w*) 11 & 12 Vict. c. 42, s. 5.

Art. 24.

Justices for a county, &c., may act for it in an adjoining city or place

A justice of the peace acting for any county at large, or for any riding or division of such county, may act as such at any place within any city, town, or other precinct, being a county of itself, or otherwise having exclusive jurisdiction,

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of exclusive jurisdiction.

and situated within, surrounded by, or adjoining to any such county, riding, or division respectively; and all acts, matters and things, to be so done by such justice within such city, town, or precinct, as justice for such county, riding, or division respectively, shall be as valid and effectual in law as if the same had been done within such county, riding, or division respectively, to all intents and purposes whatsoever: Provided that nothing in this Article contained shall extend to give power to the justices of the peace for any county, riding, or division, not being also justices for such city, town, or other precinct, or not having authority as justices of the peace therein, or any peace officer acting under them, to act or intermeddle in any matters or things arising within any such city, town, or precinct, in any manner whatsoever. (*x*)

Not to give power to act, &c., in any matters, &c., arising within the same.

(*x*) 11 & 12 Vict. c. 42, s. 6.

ART. 25.

Detached parts of counties.

Any justice of the peace acting for any county, riding, division, or part of a county having a separate commission of the peace, may act as a justice of the peace in all things whatsoever concerning or in anywise relating to any detached part of any other county, riding, division, or part of a county having a separate commission of the peace, which is surrounded in whole or in part by the county, riding, division, or part of a county for which such justice acts; and all acts of such justice, or of any peace officer in obedience thereto, shall be as good, in relation to any detached part of such other county, riding, division, or part of a county, and all offenders in such detached part may be committed for trial, tried, convicted and sentenced, and judgment and execution may be had upon them, in like manner as if such detached part were to all intents and purposes part of the county, riding, division or part of a county for which such justice acts; and all peace officers of such detached parts are hereby required to obey the warrants, orders, and acts of such justice, and to perform their several duties in respect thereof. (*y*)

(*y*) 2 & 3 Vict. c. 82, s. 1 and 3; 11 & 12 Vict. c. 42, s. 7. The Acts direct all such constables and other officers to perform their several duties, &c., under the pains and penalties to which any constable or other officer may be liable for a neglect of duty.

ART. 26.

Other magistrates than justices of the peace may issue summons or warrant in all cases where justices may.

In all cases where a justice of the peace may issue a summons or a warrant of arrest, such a summons or warrant, to be executed within the limits of his jurisdiction, may be issued by any judge of the Court of Queen's Bench, (*z*) or any justice of oyer and terminer (*a*) or gaol delivery; (*b*) and every such summons and warrant, unless where it is otherwise specially provided, shall be subject to all the rules in this Section mentioned with respect to summonses and warrants to be issued by justices of the peace, and the service, execution, and backing of such summonses and warrants respectively, so far as the same rules are applicable. (*c*)

(*z*) 1 Hale's P. C., 578.
(*a*) 1 Hale's P. C., 579.
(*b*) 1 Leach, 116, (Rudh's Case.)
(*c*) As the recent statute, 11 & 12 Vict. c. 42, is for the most part directed to provide for proceedings before justices of the peace, it creates some anomalies in respect of the discrepancy between these proceedings and analogous proceedings before other magistrates than justices of the peace, we have thought it expedient to remove this discrepancy by the insertion of the above Article.

ART. 27.

As to the apprehension of persons stealing or embezzling naval stores, and committing certain offences relating to navy pay, &c.

For the more speedy and effectual bringing to justice of persons who shall steal or embezzle any of Her Majesty's naval stores, or who shall commit any offence against any of Articles 5, 6, 7, 8, 9, and 10 of Section 8 of Chapter VIII. of the Act of Crimes and Punishments, any of the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland for the time being, the Controller, Surveyor, or Clerk of the Accounts of the Navy for the time being, or any Superintendent appointed under the provisions of an Act passed in the second year of the reign of King William IV., intituled, "An Act to amend the Laws relating to the business of the Civil Departments of "the Navy, and to make other regulations for more effectually carrying on the "Duties of the said Departments," may, from time to time, in all places whatsoever, act as a justice of the peace to all intents and purposes, in causing any person who shall be charged with any such offence, to be apprehended, committed, and prosecuted for the same; and all peace officers are hereby required to obey the warrants, orders, and acts of any one or more of such persons, touching any of the

matters and things hereinbefore contained, and to perform their several duties in respect thereof. (*d*)

(*d*) See 9 Geo. III. c. 50, s. 5; 55 Geo. III. c. 60, s. 1; 11 Geo. IV., and 1 Will. IV. c. 20, s. 92; 2 Will. IV. c. 40, ss. 5 and 11. By the present law it appears that the controller, surveyor, and clerk of the accounts can only act as justices in case of persons guilty of stealing or embezzling Her Majesty's naval stores; but there can be no objection to giving them the like power with respect to the other offenders mentioned in the above Article.

ART. 28.

Where a summons or warrant shall be issued under the provisions of either of the last two preceding Articles, the forms in Section 2 of Chapter XII. of this Act may be varied so far as it may be necessary to render them applicable to the judges, justices and other persons thereby authorized to issue the same.

Forms of warrants, &c., may be varied in certain cases.

ART. 29.

In all cases where a coroner's jury shall return a verdict of murder or of extenuated or negligent homicide against any person, such coroner, if such person shall not then be in custody, may issue his warrant to apprehend such person and cause him to be brought before some justice of the peace for the county for which such coroner acts, to be dealt with in manner in Section 5 of this Chapter mentioned; and every such warrant shall be subject to all the rules in this Section mentioned with respect to warrants to be issued by justices of the peace, and the execution and backing of such warrants, so far as the same rules are applicable. (*e*)

Warrants by coroners.

(*e*) We recommend that coroners' inquisitions should no longer be used as a mode of formal charge. They are never relied upon, a bill of indictment being always presented notwithstanding the return of a coroner's inquisition to the assizes; and if provision were to be made, that where so returned no bill of indictment should be preferred, the consequence in the majority of cases would be the acquittal of the offender, since it is seldom that a coroner's inquisition is good upon the face of it. We further propose that coroners, upon the finding of a verdict of murder or manslaughter, instead of committing the person against whom any such verdict shall be found for trial, shall henceforth have power only to order him to be taken before a magistrate for examination, or to be apprehended when he is not in custody, in order to his being taken before a magistrate for that purpose. This alteration of the law will get rid of the conflict of authority which has occasionally occurred between magistrates and coroners. If these recommendations be adopted, coroners' warrants, instead of falling under the head of *process*, will constitute modes of compelling a person to appear for the purpose of preliminary inquiry, and consequently belong to the present Chapter. See the Evidence on the subject of Coroners' Inquisitions in the Appendix to the Eighth Report of the Criminal Law Commissioners.

ART. 30.

Where any person shall be present before the coroner when any such verdict as in the last preceding Article is mentioned shall be returned against him, such coroner shall, by his warrant signed by and under the seal of such coroner, order such person to be taken before some justice of the peace for the county for which such coroner acts, to be dealt with in manner in Section 5 of this Chapter mentioned.

ART. 31.

Where any person shall be confined in any gaol or other prison for any offence at the time when any such verdict as in Article 29 of this Section is mentioned shall be returned against him, the coroner shall, upon its being proved before him upon oath that the person so confined, and the person against whom such verdict shall be so returned are one and the same person, issue his warrant signed by and under the seal of such coroner, directed to the gaoler or keeper of the gaol or prison in which such person shall be so confined, commanding him to detain such person in his custody until he shall be removed or discharged therefrom by due course of law.

ART. 32.

Where a charge or complaint for any crime shall be made before any justice of the peace for any county, if it be intended to issue a warrant in the first instance against any party so charged, an information and complaint thereof (A.) in writing, on the oath of the informant or of some witness or witnesses in that behalf, shall be laid before such justice: Provided that, in all cases where it is intended to issue a summons instead of a warrant in the first instance, it shall not be necessary that such information and complaint shall be in writing, or be sworn to, but in every such case such information and complaint may be by parol merely, and without any oath to support or substantiate the same: Provided also, that no objection

When charge, &c., is made, if a warrant is to be issued, information, &c., on oath, to be laid before justices.

If summons to be issued instead, information, &c., not necessary to be on oath.

No objection

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allowed for alleged defect in form.

shall be taken or allowed to any such information or complaint for any alleged defect therein in substance or in form, or for any variance between it and the evidence adduced on the part of the prosecution before the justice who shall take the examination of the witnesses in that behalf, as hereinafter in Section 5 of this Chapter is mentioned. (*f*)

(*f*) 11 & 12 Vict. c. 42, s. 8.

ART. 33.

Upon complaint being laid, justices receiving the same may issue summons or warrant for appearance of person charged

Upon such information and complaint being so laid, as in the last preceding Article is mentioned, the justice receiving the same may, if he shall think fit, issue his summons or warrant respectively, as hereinbefore in this Section is directed, to cause the person charged with any crime to be and appear before him, or any other justice for the same county, to be dealt with according to law; and every such summons (C.) shall be directed to the party so charged in and by such information, and shall state shortly [either in legal terms or in substance, the crime on which it is founded, and shall refer to the Article of the Act of Crimes and Punishments by which it is made punishable], and shall require the party to whom it is so directed to be and appear at a certain time and place therein mentioned before the justice who shall issue such summons, or before any other justice for the same county, who may then be there, to answer to such charge, and to be further dealt with according to law. (*g*)

(*g*) 11 & 12 Vict. c. 42, s. 9, in part. We have added the words between brackets for the purpose of giving more certain information to the accused.

ART. 34.

How summons to be served.

Every summons shall be served by a peace-officer upon the person to whom it is directed, by delivering the same to the party personally, or if he cannot conveniently be met with, then by leaving the same with some person for him at his last or most usual place of abode; and the peace-officer who shall have so served the same, shall attend at the time and place and before some justice in such summons mentioned, to depose, if necessary, to the service of such summons; and if

If party summoned do not attend, justice may issue a warrant to compel attendance.

the person so served shall not be and appear before some such justice at the time and place mentioned in such summons, in obedience to the same, then it shall be lawful for any justice in such summons mentioned to issue his warrant (D.) for apprehending the party so summoned, and bringing him before such justice or some other justice for the same county, to answer the charge in the information and complaint mentioned, and to be further dealt with according to law. (*h*)

(*h*) 11 & 12 Vict. c. 42, s. 9, in part.

ART. 35.

No objection allowed for alleged defect in Form, &c.

Provided that no objection shall be taken or allowed to any such summons or warrant, as in the last two preceding Articles is mentioned, for any alleged defect therein in substance or in form, or for any variance between it and the evidence adduced on the part of the prosecution before any justice who shall take the examinations of the witnesses in that behalf, as hereinafter in Section 5 of this Chapter is mentioned; but if any such variance shall appear to such justice to be such that the party charged has been thereby deceived or misled, it shall be lawful for such justice, at the request of the party so charged, to adjourn the hearing of the case to some future day, and in the mean time to remand the party so charged, or admit him to bail, in manner hereinafter in the same Section mentioned. (*i*)

(*i*) 11 & 12 Vic. c. 42, s. 9, in part.

ART. 36.

Warrant to apprehend parties to be under hand and seal of justice.

How warrant to be directed, and to whom.

Every warrant (B.) to be issued by any justice of the peace to apprehend any person charged with any crime, shall be signed by (*j*) and under the seal (*k*) of the justice issuing the same, and may be directed either to any peace officer or other person by name, or generally to the constable of the parish or other district within which the same is to be executed, without naming him, or to such constable and all other constables or peace officers in the county or other district within which the justice issuing such warrant has jurisdiction, or generally to all the constables or peace officers within such last-mentioned county or district; and it shall state shortly, [either in legal terms or in substance,] the crime on which it is founded, [and shall refer to the Article of the Act of Crimes and Punishments by which it is made punishable,] and shall name or otherwise describe the offender, and it shall order the person or persons to whom it is directed to

apprehend the offender and bring him before the justice issuing such warrant, or some other justice for the same county, to answer to the charge contained in the information, and to be further dealt with according to law.

(*j*) The expression "under hand" in the 11 & 12 Vic. 42, s. 10, from which the above Article is borrowed, may possibly give rise to an uncertainty, whether according to popular language the whole instrument ought not to be written by the magistrate: this uncertainty will be avoided by using the term "signed" in the place of "under the hand."

It is to be observed that many magistrates, as other persons, habitually use initials or contractions for their Christian names, and questions have arisen as to the sufficiency of such signatures. If they be deemed insufficient, it may be feared that warrants may frequently be rendered invalid on account of this unsubstantial defect from the force of habit in signing upon other occasions. It might perhaps be expedient to provide that the surname should be in full, but that initials or contractions of the Christian name are permitted.

As printing names is on a variety of occasions in legal proceedings used instead of signing, it may be a question, whether, in the case of warrants, a printing of the name should not be prohibited, on account of the great importance of identifying the signature, where personal liberty is restricted.

(*k*) In ancient times seals were required to give authenticity to a variety of written instruments, as well because persons exercising important functions were often unable to write, as because the identification of the seals of particular individuals was much more feasible than at present, and because great solemnity was supposed to attach to the act of sealing. At present the seals of magistrates affixed to their warrants are most usually nothing more than common wafers affixed by their clerks, opposite to which they write their names, performing no other ceremony whatever. It seems to be unnecessary the additional requisite of sealing to warrants, and the Legislature has occasionally contemplated the existence of warrants not under seal. As an instance, see 24 Geo. II. c. 44, which protects where the warrant is under the hand *or* seal. But the seal being made requisite by so recent an Act as the 11 & 12 Vic., c. 42, we have not felt ourselves justified in omitting it. We have added the words between brackets for the purpose of giving more certain information to the accused.

Art. 37.

Every warrant of arrest to be issued by a judge of Her Majesty's Court of Queen's Bench in England, is to be directed to his tipstaff and to all constables or other peace officers.

To whom warrant of a judge of Court of Queen's Bench to be directed.

Art. 38.

A warrant of arrest need not be made returnable at any particular time; but the same may remain in force until it shall be executed. (*l*)

Warrant, how long in force.

(*l*) See 8 T. R. 110; Peake's N. P. 344; 11 & 12 Vic. c. 42, s. 10, in part.

Art. 39.

A warrant of arrest may be executed by apprehending the offender, in the case of warrant (B.), at any place within the county within which the justice issuing the same shall have jurisdiction, or in case of fresh pursuit at any place in the next adjoining county, and within seven miles of the border of such first-mentioned county, without having such warrant backed as hereinafter in Article 45 of this Section is mentioned; and, in the case of the warrant of a judge of the Court of Queen's Bench, at any place in England. (*m*)

How and where warrant may be executed.

(*m*) 11 & 12 Vic. c. 42, s. 10, in part. In boroughs under the provisions of the Municipal Corporation Act summonses and warrants of arrest issued by justices for such boroughs in matters within their jurisdiction may be respectively served and executed within any county within which such boroughs are situated, *or* within any distance not exceeding seven miles from such borough. It will be observed that, where such service or execution is *within* the county in which the borough is situated, it may be beyond the distance of seven miles from the borough; but in the cases specified in the above Article, the distance, although within the county, must not exceed seven miles from the border of the borough. In construing the above Article it is to be borne in mind that "county" is to be read as if it were "county or borough," as explained by Article 7 of this Section. We think it better that there should be one uniform rule on the subject, and have therefore omitted the provision of the Municipal Corporation Act (5 & 6 Will. IV., c. 76, s. 101) referred to. We are inclined to think the rule in the Municipal Corporation Act the better one; but we have not felt justified in adopting it in preference to the rule in the above Article, as the latter has been so recently enacted by the Legislature.

Art. 40.

Where a warrant of arrest shall be directed to all constables or other peace officers, it shall be lawful, in the case of warrant (B.), for any constable or other peace officer for any parish, township, hamlet, or place within the county or district within which the justice issuing the same shall have jurisdiction, to execute the same warrant within any parish, township, hamlet, or place situate within the jurisdiction for which such justice shall have acted when he granted such warrant, and, in the case of the warrant of a judge of the Court of Queen's Bench, for any constable or other peace officer for any parish, township, hamlet, or place in England, to execute the same warrant within any such last-mentioned parish, hamlet, township, or place, in like manner as if such warrants respectively

were directed specially to such constable by name, and notwithstanding the place in which such warrants respectively shall be executed shall not be within the parish, township, hamlet, or place for which he shall be such constable or other peace officer. (*n*)

(*n*) See the 11 & 12 Vic. c. 42, s. 10, in part. By the common law, a warrant directed to all constables could not be executed by any of them out of his own precinct. The law was altered in this respect by the 5 Geo. IV. c. 18, s. 6; but only, it has been held, so far as regards the warrants of justices of the peace. (See Gladwell *v.* Blake, 1 Crom. Mees. and Rosc., 636.) The provisions of the 11 & 12 Vic. c. 42, s. 10, would no doubt be held to have a like limited operation; we have, therefore, altered the language of the 11 & 12 Vic. c. 42, s. 10, so as to make it applicable to warrants issued by judges of the Court of Queen's Bench.

ART. 41.

Where a warrant of arrest is directed to any single peace officer, either by name or by official description, if he cannot by reason of sickness or other special cause execute such warrant, he may make a deputy for that purpose (*o*).

(*o*) It may be questioned whether a constable should be allowed to create a deputy. As to which it is to be observed that the fact of appointment may often become a matter of doubt or controversy. And although the office be ministerial, it is one requiring the exercise of considerable discretion, and the knowledge of various legal provisions. Where a warrant is directed to several peace officers, it would seem that a deputy could not be appointed by any of them whilst the others were capable of performing their duty. But even this point may admit of doubt. And in the present day, when preliminary proceedings are conducted so generally by police officers, it may be considered that arrests, or the entering of houses by deputy constables, should no longer be permitted.

ART. 42.

All summonses and warrants of arrest to be issued in any criminal proceeding within the metropolitan police district, or by any justice of the peace within such district shall be served and executed by a constable of the metropolitan police force, and by none other. (*p*)

(*p*) 2 & 3 Vict. c. 47, s. 12.

ART. 43.

When any warrant of arrest shall be directed or delivered to any such constable, as in the last preceding Article is mentioned, unless it be necessary for the due execution thereof that such warrant be executed without delay, the constable shall deliver the same to the superintendent or other his superior officer belonging to the metropolitan police force, who shall appoint by indorsement thereon one or more constables to execute the same; and every constable whose name shall be so indorsed shall have the same powers, privileges, and protection for and in the execution of such warrant as if the same had been originally directed to him or them by name. (*q*)

(*q*) 2 & 3 Vict. c. 47, s. 13.

ART. 44.

No objection allowed for alleged defect in Form, &c.

No objection shall be taken or allowed to any warrant of arrest for any defect therein in substance or in form, or for any variance between it and the evidence adduced on the part of the prosecution before the justice who shall take the examinations of the witnesses in that behalf, as hereinafter in Section 5 of this Chapter is mentioned; but if any such variance shall appear to such justice to be such that the party charged has been thereby deceived or misled, it shall be lawful for such justice, at the request of the party so charged, to adjourn the hearing of the case to some future day, and in the mean time to remand the party so charged, or to admit him to bail, in manner hereinafter in the same Section mentioned. (*r*)

(*r*) 11 & 12 Vic. c. 42, s. 10, in part.

ART. 45.

Regulations as to the backing of warrants.

If the person against whom any warrant (B.) shall be issued shall not be found within the jurisdiction of the justice by whom the same shall be issued, or if he shall escape, go into, reside, or be, or be supposed or suspected to be, in any place in England out of the jurisdiction of the justice issuing such warrant, it shall be lawful for any justice of the peace for the county into which such person shall so escape or go, or in which he shall reside or be, or be supposed or suspected to be, upon proof alone being made on oath of the handwriting of the justice issuing such warrant, to make an indorsement (F.) on such warrant, signed with his name, authorizing the execution of such warrant within the jurisdiction of the justice making such indorsement, and which indorsement shall be sufficient

authority to the person bringing such warrant, and to all other persons to whom the same was originally directed, and also to all constables and other peace officers of the county where such warrant shall be indorsed, to execute the same in such other county, and to carry the person against whom such warrant shall have issued, when apprehended, before the justice who first issued such warrant, or before any other justice in and for the same county, or before any justice for the county where the crime in such warrant mentioned appears therein to have been committed: Provided that if the prosecutor, or any of the witnesses upon the part of the prosecution, shall then be in the county where such person shall have been so apprehended, the constable or other person or persons who shall have so apprehended such person may, if so directed by the justice backing such warrant, take and convey him before the justice who shall have so backed such warrant, or before any other justice for the same county; and any such justice may thereupon take the examinations of such prosecutor or witnesses, and proceed in every respect in manner hereinafter in Section 5 of this Chapter directed with respect to persons charged before a justice of the peace with a crime alleged to have been committed in another county than that in which such persons have been apprehended. (*s*)

Proviso.

(*s*) 11 & 12 Vic. c. 42, s. 11.

ART. 46.

English warrants may be backed in Ireland, and *vice versâ*, in the event of parties escaping.

If any person against whom a warrant shall be issued in any county in England, by any justice of the peace, or by any Judge of Her Majesty's Court of Queen's Bench, or justice of oyer and terminer or gaol delivery, for any crime, shall escape, go into, reside, or be, or be supposed or suspected to be, in any county or place in Ireland, or if any person against whom a warrant shall be issued in any county or place in Ireland, by any justice of the peace, or by any judge of Her Majesty's Court of Queen's Bench there, or any justice of oyer and terminer or gaol delivery, for any crime or offence against the laws of that part of the United Kingdom, shall escape, go into, reside, or be, or be supposed or suspected to be, in any county in England, it shall be lawful for any justice of the peace for the county or place into which such person shall escape or go, or where he shall reside or be, or be supposed or suspected to be, to indorse (F.) such warrant in manner in the last preceding Article mentioned, or to the like effect, and which warrant so indorsed shall be a sufficient authority to the person or persons bringing such warrant, and to all persons to whom such warrant was originally directed, and also to all constables or other peace officers of the county or place where such warrant shall be so indorsed, to execute such warrant in the county or place where the justice so indorsing it shall have jurisdiction, by apprehending the person against whom such warrant shall have been granted, and to convey him before the justice who granted the same, or before any other justice of the peace for the same county or place, and which justice before whom he shall be so brought shall thereupon proceed in such and the same manner as if such person had been apprehended in such last-mentioned county or place. (*t*)

Warrants so indorsed to be valid.

(*t*) 11& 12 Vic. c. 42, s. 12.

ART. 47.

English warrants may be backed in the Isles of Man, Guernsey, Jersey, Alderney, or Sark, and *vice versâ*.

If any person against whom a warrant shall be issued in any county in England, by any justice of the peace, or by any judge of Her Majesty's Court of Queen's Bench, or justice of oyer and terminer or gaol delivery, for any crime, shall escape, go into, reside, or be, or be supposed or suspected to be, in any of the Isles of Man, Gurnsey, Jersey, Alderney, or Sark, it shall be lawful for any officer within the district into which such accused person shall escape or go, or where he shall reside or be, or be supposed or suspected to be, who shall have jurisdiction to issue any warrant or process in the nature of a warrant for the apprehension of offenders within such district, to indorse (F.) such warrant in the manner in Article 45 of this Section mentioned, or to the like effect; or if any person against whom any warrant or process in the nature of a warrant, shall be issued in any of such isles, shall escape, go into, reside, or be, or be supposed or suspected to be, in any county in England, it shall be lawful for any justice of the peace for the county into which such person shall escape or go, or where he shall reside or be, or be supposed or suspected to be, to indorse (F.) such warrant or process in manner in the same Article 45 mentioned, and every such warrant or process, so indorsed, shall be a sufficient authority to the person or persons bringing the same, and to all persons to whom the same respectively was originally directed, and also to all constables or other peace officers of the county or district within which such

Warrants so indorsed to be valid.

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warrant or process shall be so indorsed, to execute the same within the county or district, where the justice or officer indorsing the same shall have jurisdiction, by apprehending the person against whom such warrant or process shall have been granted, and to convey him before the justice or officer who granted the same, or before any other justice or officer within the same county or district who shall have jurisdiction to commit such person to prison for trial, and which justice or officer shall thereupon proceed in such and the same manner as if such person had been apprehended within his jurisdiction. (*u*)

(*u*) 11 & 12 Vic. c. 42, s. 13.

ART. 48.

English warrants may be backed in Scotland.

If any person against whom a warrant shall be issued by any justice of the peace for any county within England, or by any judge of Her Majesty's Court of Queen's Bench, or justice of oyer and terminer or gaol delivery in England, for any crime, shall escape, go into, reside, or be, or be supposed or suspected to be, in any place in Scotland, it shall be lawful for the sheriff, or steward depute, or substitute, or any justice of the peace of the county or place where such person or persons shall go into, reside, or be, or be supposed or suspected to be, to indorse (F.) such warrant in manner in Article 45 of this Section mentioned, or to the like effect, which warrant so indorsed shall be a sufficient authority to the person or persons bringing such warrant, and to all persons to whom such warrant was originally directed, and also to all sheriffs' officers, stewards' officers, constables, and other peace officers of the county or place, where such warrant shall be so indorsed, to execute the same within the county or place where it shall have been so indorsed, by apprehending the person against whom such warrant shall have been granted, and to convey him before the justice who granted the same, or before any other justice of the peace for the same county, and which justice before whom he shall be so brought, shall thereupon proceed in such and the same manner as if such person had been apprehended within such last-mentioned county. (*x*)

Warrants so indorsed to be valid.

(*x*) 11 & 12 Vic. c. 42, s. 14.

ART. 49.

Scotch warrants may be backed in England.

If any person against whom a warrant shall be issued by the Lord Justice General, Lord Chief Justice Clerk, or any of the Lords Commissioners of Justiciary, or by any sheriff or steward depute, or substitute, or justice of the peace, of Scotland, for any crime or offence against the laws of that part of the United Kingdom, shall escape, go into, reside, or be, or shall be supposed or suspected to be in any county in England, it shall be lawful for any justice of the peace in and for the county into which such person shall escape or go, or where we shall reside or be, or shall be supposed or suspected to be, to indorse (F.) such warrant in manner in Article 45 of this Section mentioned, and which warrant so indorsed shall be a sufficient authority to the person or persons bringing the same, and to all persons to whom the same was originally directed, and also to all constables and other peace officers of the county where the justice so indorsing such warrant shall have jurisdiction, to execute such warrant in the county where it is so indorsed, by apprehending the person against whom such warrant shall have been granted, and to convey him into the county or place in Scotland, next adjoining to England, and carry him before the sheriff or steward depute, or substitute, or one of the justices of the peace of such county or place, and which sheriff, steward depute or substitute, or justice of the peace is hereby required thereupon to proceed in such and the same manner, according to the rules and practice of the law of Scotland, as if such person had been apprehended in such last-mentioned county or place in Scotland. (*y*)

Warrants so indorsed to be valid.

(*y*) 11 & 12 Vic. c. 42, s. 15.

ART. 50.

Warrants issued within the metropolitan police district, by whom to be executed.

Every warrant to compel the appearance of any person, or warrant for the apprehension of any person charged with any offence, issued by any of the magistrates of the metropolitan police courts in respect of any matter arising within the metropolitan police district, may be served or executed out of the metropolitan police district by the constable or constables to whom the same shall be directed, and shall have the same force and effect as if the same had been

originally issued or subsequently indorsed by a justice of the peace having jurisdiction in the place where the same shall be served or executed. (*z*)

(*z*) 2 & 3 Vict. c. 71, s. 17.

Art. 51.

Warrants of justices of Middlesex, Surrey, &c., void in certain cases within the metropolitan police district.

And every summons or warrant which shall be issued by any justice of the peace (*a*) for the counties of Middlesex, Surrey, Kent, Essex or Hertfordshire respectively, requiring any person residing within the metropolitan police district to appear at any place within such district to answer any information or complaint within the meaning of this Section, touching any matter arising within such district, shall be utterly void. (*b*)

(*a*) These are the words of the Act, but they seem to be too extensive. Qy. Should not the words "not being a magistrate of any of the metropolitan police courts" be added.

(*b*) 2 & 3 Vict. c. 71, s. 18.

Art. 52.

Warrant, how to be executed.

An arrest on a warrant may be made on any day and at any time of the day or night. (*c*)

(*c*) 1 Chitt. C. L. 49. See 29 Car. II. c. 7, s. 6. Under the provisions of this statute a party may be arrested on Sunday on an attachment for a rescue, Willes 459; or under an escape warrant, 5 T. R. 25; Barnes 373. By the present law the power to arrest on a Sunday or in the night time is confined to treason, felony, and breach of the peace; but since the last may consist of a simple assault, and even as it has been held (see Johnson *v.* Colston, 7 Raym. 250) of any offence which is impliedly against the peace, we see no reason why the power should not be extended to all indictable offences, and we have altered the law accordingly. It is also to be observed, that the present rule applies to a large class of offences under the denomination of felony, which by the Act of Crimes and Punishments will henceforth be misdemeanors only.

Art. 53.

An arrest must be made by some actual touching or confining of the body, (*d*) unless there be a submission to the custody by words or actions. (*e*) The laying hold of the party and pronouncing words of arrest is an actual arrest. (*f*)

(*d*) Step. C. L. 244; Chitty's Burn's Justice, tit. "Arrest."

(*e*) See the Cases 1 Chitty's C. L. 48.

(*f*) Foster, Disc. 2 of Homicide, 320.

Art. 54.

The party arrested is not to be subjected to any more excessive restraint than such as may be reasonably necessary for the purpose of preventing his escape. (*g*)

(*g*) See 6 Dow. & Ry. 623. We have omitted Articles 25 and 26 of Sect. 2 of Chap. I. of the Act of Procedure, as not being essential to the lawful execution of a warrant. It is not necessary that their provisions should be complied with, except for the justification of a person who happens to kill another in the endeavour to execute a warrant; and rules on the subject are contained in the Chapter on Homicide in the Act of Crimes and Punishments.

"Art. 25.

"One executing or attempting to execute a warrant of arrest, is bound to notify to the party against "whom such warrant is directed that he purposes to act under the authority of that warrant." *

"* See the Act of Crimes and Punishments, Chap. XV. Section 2, Art. 14, 7th Report of Criminal Law Commissioners.

"Art. 26.

"A sworn constable or other commonly known officer executing a warrant of arrest must notify the "substance of the warrant, but need not show the warrant." †

"† Bac. Ab. 'Constable,' D.; 6 Co. 54; 9 Co. 69. See 27 Geo. II. c. 20 (as to warrants of distress)."

Art. 55.

A person not being a peace officer, or any peace officer not being a sworn constable or other commonly known officer, or any peace officer whatsoever acting out of his precinct, is to show the warrant, if sight of it be demanded. (*h*)

(*h*) Distinctions have been made on this subject between commonly known officers acting within their own precincts, and such as are either not known, or who act beyond their precints. See Haw. b. 2, c. 13, s. 28; 2 Hale, 116; 1 East P. C. 312, 314–319. But it has been doubted whether it be reasonable or convenient that a party should be bound to surrender his liberty on the mere assertion of another. See the observations of Lord Kenyon, 8 T. R. 188.

Art. 56.

If upon a person's delivering his warrant for inspection, a party illegally refuse to re-deliver it to such person, he may retake it by force, provided he use no greater degree of violence than is necessary for the purpose. (*i*)

(*i*) R *v.* Milton, 3 C. & P. 31.

ART. 57.

If, after notice by a person authorized by warrant to arrest another for treason, felony, or for causing any grievous bodily harm, (*j*) of his intention to arrest him, the party against whom such warrant is issued shall either fly or forcibly resist the endeavour to arrest him, the person so authorized is bound to use all such means as may be necessary to effect an arrest and prevent escape. (*k*)

(*j*) The language of the authorities is "for a dangerous wound given," but we have made this alteration conformably with the recommendations contained in the Act of Crimes and Punishments. See Chap. XV. Sect. 7.

(*k*) See the Act of Crimes and Punishments, Chap. XV. Sec. 5; 1 Hale's P. C. 489; 1 East's P. C. 248, 300; but see Livingstone, p. 505.

ART. 58.

Breaking of outer door.

A person authorized by a warrant to arrest any party on a charge of any crime, may break open any outer door or window of a dwelling-house in order to execute such warrant, if after notification of his authority and purpose, and demand of admittance duly made, he cannot otherwise obtain admittance. (*l*)

(*l*) See Foster, Disc. 2 of Homicide, 320, where the rule is thus limited, and see Fitz. Trespass, 232; Bro. Tresp. 248.—See, however, 14 East, 110; 1 Chitty's C. L. 56. By the present law the authority to break doors is confined to cases where the party sought to be arrested is charged with treason, felony, or breach of the peace, but for the reasons given in the note to Art. 52, we have extended it to charges of any indictable offence.

ART. 59.

The dwelling-house of a third person is not privileged, (*m*) and any outer door or window thereof may be broken for the purpose specified in the last preceding Article, if after such notification and demand as are mentioned in that Article, admittance cannot otherwise be obtained.

(*m*) 2 Hale 117; 5 Co. 91.

ART. 60.

A person authorized by warrant to arrest any party on a charge of any crime, having lawfully entered a dwelling-house for the purpose of arresting him, may lawfully break out of such house when it is necessary for his own liberation, and any peace officer may lawfully break any outer door or window of a dwelling-house in order to liberate any bailiff of such officer who having so entered for such purpose is unlawfully detained within such dwelling-house. (*n*)

(*n*) Foster 319; Cro. J. 555; Haw. P. C. b. 2, c. 14, s. 11.

ART. 61.

General rule.

In all cases where, in pursuance of any Article of this Section, a peace officer or other person may break open the outer door or window of a dwelling-house, he may, after such notification and demand as are requisite before breaking the outer door or window, break open any inner door or window of a dwelling-house for the purpose of discharging his duty. (*o*)

(*o*) Hawk. P. C. b. 2, c. 14, s. 11; 1 East's P. C. c. 5, s. 87; 1 Russ. on C. & M. 3rd Ed. 632.

ART. 62.

After arrest made, the person who has made it is to convey the party arrested before a justice of the peace, according to the import of the warrant. (*p*)

(*p*) 6 Dow. & Ry. 623; Steph. C. L. 248; 2 Hale, 119; Foster, 143; 8 T. R. 110. No time is specified in the warrant; and it was observed by Parker, C. J. ib., that no time could be limited without manifest injury to the party arrested. The warrant remains in force during the life of the magistrate, and a person may be twice apprehended under it if the purposes of justice have not been effected. Peake's R. 234.

ART. 63.

If the warrant be to bring the party arrested before any justice of the peace for the county specified in such warrant, the person who has made the arrest is to take the party so arrested before some neighbouring justice of the peace within such jurisdiction, (*q*) due regard being had to speed and convenience. (*r*)

(*q*) 5 Co. 59 b.; 1 Hale, 582; 2 Hale, 112.

(*r*) Foster, 143.

ART. 64.

If circumstances render the immediate taking of the party arrested before a justice of the peace reasonably impracticable, the person who has made the arrest is to detain the party arrested in custody in the mean time, and to execute the warrant as soon as its execution shall become reasonably practicable. (*s*)

(*s*) 2 Hale, 119, 120; 95, 96.

ART. 65.

No peace officer or other person, after the arrest of any suspected person, is to offer to him any inducement, by threat or promise or otherwise, to make any disclosure, but shall, when necessary, apprize him of the cause of arrest, and leave him free to speak or keep silence; and no such officer or other person shall after such arrest prevent the party arrested, by any caution or otherwise, from making any disclosure which he may be disposed to make of his own free will. (*t*)

(*t*) See Lord Denman's Answers to the Questions concerning Criminal Procedure circulated by the Criminal Law Commissioners in the Appendix, to their 7th Report, p. 211. Lord Denman there says, "The conduct of the police and other officers appears to fall naturally under the head of preliminary "procedure. In practice it often defeats justice, by preventing disclosures which offenders, particularly "young offenders, may be desirous of making. The rule laid down, as, I believe, by all the judges, is, "that the arresting officer shall apprise his prisoner of the cause of his arrest, and leave him free to "speak or keep silence. But this rule has been misunderstood by officers, who fancy themselves bound "to stop the prisoner's mouth by a caution against criminating himself, or by the use of language "which leads to the invention of falsehoods and the suppression of truth. One plain consequence likely "to result is, that the plunder is kept from its right owner, and ultimately employed in the unrighteous "defence of guilty men."

ART. 66.

When the prisoner is brought before a justice of the peace, he is still to be deemed to be in the custody of the person bringing him until he be discharged, bailed, or committed to prison. (*u*)

(*u*) 2 Hale, 120.

SECTION 2.

Of Arrest by a Person not being a Peace Officer without Warrant.

ART. 1.

Arrest by a private person without warrant.

A PERSON not being a peace officer who sees any other person committing, (*a*) or attempting to commit, (*b*) any felony, [or any crime whatsoever (except those referred to in Article 5 of this Section) punishable by virtue of any Article of Chapters XVIII. and XXI. of the Act of Crimes and Punishments, or any offence of stealing or maliciously injuring any property punishable by virtue of any other Article of that Act,(*c*)] or any offence against the provisions of Article 7 of Section 4 of Chapter VIII. of that Act, (*d*) or who sees any grievous bodily harm (*e*) caused by any other person, may, in any of such cases, immediately or on fresh pursuit made, (*f*) arrest such person without warrant. (*g*)

(*a*) Hawk. P. C. b. 2, c. 12, s. 1.

(*b*) R. *v.* Hunt, Ryan & Moody's C. C. 93; R. *v.* Howarth, Ryan & Moody's C. C. 207. It was said in the former case that he may do this in case of an attempt to commit a felony in the night time; but there seems to be no sufficient reason for so restricting the rule.

(*c*) The introduction of the words between brackets renders unnecessary the insertion of Article 8 of Section 3 of Chapter I. of the Act of Procedure. That Article is as follows:—

"ART. 8.

Of persons found committing thefts or malicious injuries to property, &c.

"If any person shall be found whilst committing any other offence than those specified in Article 6, "punishable by virtue of any Article of Chapters XVIII. and XX. of the Act of Crimes and Punish- "ments, or any offence of stealing, or otherwise fraudulently taking, obtaining, converting, or receiving, "or of maliciously injuring any property punishable by virtue of any other Article of the said Act, "except only the offence of angling in the day time, may be immediately, or on fresh pursuit made, "apprehended without a warrant by any peace officer or by the owner of the property, on or with respect "to which the offence shall be committed, or by his servant, or any person authorized by him, and "forthwith taken before some neighbouring justice of the peace, to be dealt with according to law." [See 7 & 8 Geo. IV. c. 29, s. 63; c. 30, s. 28.]

It will be observed that by the omitted Article, which embodied the provisions of the 7 & 8 Geo. IV. c. 29, s. 63, and c. 30, s. 28, the power to apprehend was limited to the owner of the property in respect of which the offence was committed, his servant or some person authorized by him. In the case, however, of a considerable, if not the greater number, of the offences contained in those Acts in respect of which this power was given, they being felonies, *any* person might, independently of the provisions of such Acts, arrest without warrant. Having in our former Reports recommended that felony as a class of crimes should be restricted to offences punishable with death or transportation, many offences in respect of which a person not being a peace officer may now arrest without warrant, will, if those recommendations be adopted, be classed as misdemeanors, and such power to arrest for the same without warrant be taken away. This would be the case as regards the crime of simple theft. It has

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appeared to us that, although as a general rule it may be proper to confine the authority of a private person to arrest without warrant to cases of felony, yet that with respect to theft and other fraudulent appropriations of and malicious injuries to property, it would be attended with advantage if the powers given by the 7 & 8 Geo. IV. cc. 29 and 30, were extended to all persons without distinction, as in the case of felony.

The insertion of the words between brackets also renders unnecessary the following Article (5 of Sect. 3 of Chap. I. of the Act of Procedure) authorizing arrest by a private person without warrant in the cases there specified, the offences intended being either cheats or false pretences, which are punishable under Chapter XIII. of the Act of Crimes and Punishments.

"Art. 5.

"Or playing with false dice, or otherwise committing an indictable fraud affecting the public."

(*d*) These words render unnecessary Article 9 of Section 3 of Chapter I. of the Act of Procedure. That Article is as follows:—

"Art. 9.

Of persons making signals to smuggling vessels.

"If any person shall offend against the provisions of Article 7 of Section 4 of Chapter VIII. of the "Act of Crimes and Punishments, any person may stop, arrest, and detain the person so offending, and "carry and convey him before any one or more of Her Majesty's justices of the peace residing near "the place where such offence shall be committed, who, if he sees cause, shall commit the offender to "the next county gaol, there to remain until the next Court of oyer and terminer or gaol delivery, or "until such person shall be delivered by due course of law. [3 & 4 Will. IV. c. 53, s. 53, in part, "repealed and re-enacted by 8 & 9 Vic. c. 87, s. 60, in part.]"

(*e*) The authorities give the power mentioned in this Article in the case of *a dangerous wound given*: we have substituted the words "grievous bodily harm" for the reasons given in the note to Article 6, p. 39, of the "Second Report of the Commissioners for Revising and Consolidating the Criminal Law."

(*f*) See R. *v.* Curran, 3, C. and P. 397; Hanway *v.* Boultbee, 4, C. and P. 350, and Chitty's Burn's Justice, tit. "Arrest," as to the meaning of the 7 & 8 Geo. IV. c. 29, s. 63, and c. 30, s. 28.

(*g*) Hawk. P. C. b. 2, c. 12, s. 1; 1 Chitty's C. L. 16; 2 Hale, 82, 83; 1 East's P. C. 299, 300; 2 Hale, 82, 83; Com. Dig. "Imprisonment."

Art. 2.

Any person not being a peace officer may, without warrant, arrest any other person who has committed a felony, although he was not present when the felony was committed:

Art. 3.

Also any other person whom he reasonably suspects of having committed a felony, which has in fact been committed: (*h*)

(*h*) 4 Black. Comm. 293; 1 Chitt. C. L. 15, 19; 2 Selw. N. P. 910; Chitty's Burn's Justice, title "Arrest," pp. 269 and 274. The authorities lay down that a private person may arrest any one whom he reasonably suspects of having committed a felony which has in fact been committed. Although according to the Act of Crimes and Punishments many offences now classed as felonies will in future be ranked as misdemeanors, yet it appears expedient, in cases of mere suspicion, founded, as such cases must be, on fallible reasoning, to restrict the power of arrest to the higher offences denominated felonies in the Act of Crimes and Punishments.

Art. 4.

Also any one whom he sees in the act of exposing an infant for the purpose of leaving it to be maintained at the expense of the public. (*i*)

(*i*) 1 Leon. 327; Com. Dig. Pleader, 3, M. 22.

Art. 5.

Of poachers.

If any person shall be seen or discovered in the night-time (*k*) upon any land, whether open or enclosed, or on any public road, highway, or path, or the sides thereof, or at the openings, outlets, or gates from any such open or enclosed land into such public road, highway, or path, whilst unlawfully taking or destroying any game or rabbits, or shall be found, in the night-time, upon any land, whether open or enclosed, with any gun, net, engine or other instrument for the purpose of taking or destroying game, it shall be lawful for the owner or occupier of such land, or for any person having a right or reputed right of free warren or free chase thereon, or for the lord of the manor or reputed manor wherein such land may be situated, or for the owner or occupier of any land adjoining either side of that part of such road, highway or path where the offender shall be, and also for any gamekeeper or servant, of any of the persons in this Article before mentioned, or any person assisting such gamekeeper or servant, to arrest such offender without warrant upon or at such land or other place, or in case of fresh pursuit being made, in any other place to which he may have escaped therefrom. (*l*)

(*k*) See Att.-Gen. *v.* Delano, 1 Price, 383, where it was held that the word "found" (the one used in the 9 Geo. IV. c. 69, s. 2) in the 57 Geo. III. c. 90 (now repealed), meant "having been seen or discovered."

(*l*) 9 Geo. IV. c. 69, s. 2, in pt.; 7 & 8 Vic. c. 29, s. 1. For the reasons given in the note to Article 1

of this Section, we have enlarged in terms the power previously given by the law to private individuals arresting for or preventing offences, though, as observed in that note, the extension is in reality not very considerable. But notwithstanding the utility of obviating unsubstantial distinctions in the nature of offences when viewed with reference to the powers in question, we have not felt justified in extending the law to the cases mentioned in this Article relative to poaching, in which the Legislature appears to have thought that the power of summary interference should be confined to certain specified persons, on account of the peculiar nature of the property injured or endangered.

Art. 6.

The terms "game" and "night-time," as used in the last preceding Article, shall be understood as defined, the former by Article 63 of Section 1 of Chapter XVIII. of the Act of Crimes and Punishments, and the latter by Article 18 of Chapter XXIII. of that Act.

Art. 7.

Of persons pawning, &c. property, if unable to give a satisfactory account of themselves.

Any person to whom any property shall be offered to be pawned, pledged, exchanged, sold, or delivered, if the party so offering the same shall not be able, or shall refuse to give a satisfactory account of himself, or of the means by which he became possessed of such property, or if the person to whom such property shall be so offered shall have any other reasonable cause to suspect that the same has been stolen, embezzled, obtained by any false pretence, or unlawfully received contrary to any of the provisions of the Act of Crimes and Punishments, is hereby authorized, and, if in his power, is required to arrest the party so offering such property, and to seize and detain such property. (*m*)

(*m*) The above Article is compounded of the 30 Geo. II. c. 24, s. 7, in part, and the 7 & 8 Geo. IV. c. 29, s. 63, in part. We have omitted Article 11 of this Section of the Act of Procedure as being unnecessary, since it is presumed that if a party had reasonable cause to suspect that the property offered to him had been stolen, he would be sufficiently justified under the provisions of the above Article in seizing and detaining such property, without the special indemnity contained in Article 11. That Article is as follows:—

"Provided that in case such property so carried or seized and detained, as in the last preceding "Article is mentioned, shall afterwards appear to be the property of the person who offered the same "to be pawned, pledged, exchanged, sold or delivered, or that he was authorized by the owner or "owners thereof to pawn, pledge, exchange, sell, or deliver the same, then and in such case the person "who shall so apprehend, seize, or detain the party who offered the said property shall be, and he "is hereby indemnified for having so done." [30 Geo. II. c. 24, s. 8.]

Art. 8.

Of persons suspected of being illegally possessed of any public stores.

Any person deputed or appointed by the Commissioners for executing the office of Lord High Admiral of Great Britain and Ireland, or by the principal officers or commissioners of the Ordnance for the time being, or any two (*n*) of them respectively (*o*), may arrest any person who may reasonably be suspected of having or carrying, or anyways conveying any Naval, Ordnance, Victualling, or other public stores or things stolen or unlawfully procured from or out of any of Her Majesty's ships or vessels, yards, storehouses, or other places, and may also seize and detain in some place of safety such stores or things; and may also at any time stop, search, and detain in some place of safety any barge, boat, or other craft, which there shall be reason for suspecting to contain any such stores or things, and may also arrest any person who may be reasonably suspected of having or conveying any such stores or things in such barge, boat, or craft; and such person so arrested shall, together with the stores and things so seized and detained, or found in such boat or craft respectively, be (so soon as conveniently may be) conveyed before any justice of the peace for the county in which such seizure shall be made, or before any of the commissioners for executing the office of Lord High Admiral, or any commissioner of the Ordnance for the time being, who is hereby authorized to act as a justice of the peace to all intents and purposes as regards the person and property so conveyed before him. (*p*)

(*n*) The 39 and 40 Geo. III. c. 89, requires three; but the number having been altered to two in the case of the commissioners of the Admiralty, we think it may also be made two in the case of the commissioners of the Ordnance.

(*o*) See 39 and 40 Geo. III. c. 89, ss. 12 and 13; 55 Geo. III. c. 127, s. 2; 2 Will. IV. c. 40. Qy. where the stores are other public stores than Naval, Ordnance, or Victualling stores, can a person appointed as mentioned in the above Article act in such case? The 55 Geo. III. c. 127, s. 2, merely extends all the powers, provisions, clauses, matters and things contained in the 39 & 40 Geo. III. c. 89 (which relates to Naval, Ordnance, and Victualling stores only), to all public stores.

(*p*) This Article is compounded of Articles 12 and 13 of Section 3 of Chapter I. of the Act of Procedure:—

"Art. 12.

"Any person deputed or appointed by the principal officers or commissioners of the Navy, "Ordnance, or Victualling, or any three of them respectively may, at any time or times, stop, search, "and detain in some place of safety any barge, boat, or other craft, which there shall be reason to

Chap. I. Sec. 2.

" suspect doth contain any Naval, Ordnance, Victualling, or other public stores or things stolen, " embezzled, or unlawfully procured from or out of any of Her Majesty's ships or vessels, yards, " storehouses, or other places; and may also apprehend and detain, or cause to be apprehended and " detained, any person who may be reasonably suspected of having or conveying any such stores or " things in such barge, boat, or craft; and such person so apprehended shall be (as soon as conve- " niently may be) conveyed before any commissioner of the Navy, Ordnance, or Victualling for the " time being, or before one or more justice or justices of the peace of the county, division, city, town " corporate, liberty, or place in which such seizure shall be made, together with the stores and things " so found in such boat or other craft; which said commissioner or justice is hereby required to commit " or bind over, or otherwise to deal with such person or persons according to law in respect to any of " the said stores or things, which shall be marked as is mentioned in any Article of Section 2 of " Chap. VIII. of the Act of Crimes and Punishments." [39 & 40 Geo. III. c. 89, s. 12, in part; 55 Geo. III. c. 127, s. 2.]

"Art. 13.

" Any person deputed or appointed, as in the last preceding Article is mentioned, or any police " officer, constable, headborough, or peace officer, or any beadle or watchman (during such time as he " shall be on duty), of every parish and place where he shall be an officer, may apprehend and detain, " or cause to be apprehended and detained, any person who may reasonably be suspected of having or " carrying, or anyways conveying any Naval, Ordnance, Victualling, or other public stores, or things " stolen or unlawfully procured from or out of any of Her Majesty's ships or vessels, yards, storehouses, " or other places, and may also seize and detain in some place of safety such stores, or things as last " aforesaid; and, as soon as conveniently may be, convey or cause the person so apprehended to be " conveyed before any commissioner of the Navy, Ordnance, or Victualling, or before any one or " more justice or justices of the peace for any county, division, city, town corporate, liberty, or place in " or near to the place of seizure, together with the said stores and other things; and such and the like " proceedings shall and may be had and taken against the said person in respect of such stores or " things, if marked as is mentioned in any Article of Section 2 of Chap. VIII. of the Act of Crimes " and Punishments, as are in the last preceding Article directed with respect to stores found in any " barge, boat, or other craft as therein mentioned." [39 & 40 Geo. III. c. 89, s. 13, in part; 55 Geo. III. c. 127, s. 2.]

Art. 9.

Mode of proceeding to arrest.

A person not being a peace officer proceeding to arrest any other person without a warrant for so doing, is bound, previously to arresting him, to notify to such other person the cause for which he is about to arrest him. (*q*)

(*q*) See Livingstone's Code of Procedure, 504. In addition to notifying the cause for which he arrests, the Article in the Act of Procedure makes it essential that the person arresting should require the party intended to be arrested to submit; but it appears to us to be sufficient that he notifies the cause for which he arrests; as, for instance, " I arrest you for theft."

Art. 10.

Provided that such notification is not necessary where the person arrested is in the actual commission of any offence, or where, from other circumstances, such person may be reasonably supposed to know the cause for which he is about to be arrested. (*r*)

(*r*) R. *v.* Howarth, R. & R. C. C. 207; 1 Russ. on C. & M. 3rd edition, 623.

Art. 11.

A person not being a peace officer may, without warrant, if after notification of his purpose and demand of admittance duly made he cannot otherwise obtain admittance, break open any outer door or window of a dwelling-house in order to apprehend one who has committed a felony upon, or caused any grievous bodily harm to, any other person. (*s*)

(*s*) Fost. 320; 5 Co. 93; 4 Black. Comm. 292. It would seem expedient to restrict the power of entering a dwelling-house without warrant to cases of felony, as defined in the Act of Crimes and Punishments, although the present Article will, in consequence, preclude the entering of a dwelling-house in some cases in which it is allowable at present.

The term *grievous bodily* harm is substituted for *dangerous wound* for the reasons given in the note to Article, 6, p. 39, of the " Second Report of the Commissioners for Revising and Consolidating the Criminal Law."

Art. 12.

The dwelling-house of a third person is not privileged in the cases mentioned in the last preceding Article, provided the offender sought be therein; and any outer door or window thereof may be broken for any purpose specified in the last preceding Article, if after such notification and demand as are mentioned in that Article, admittance cannot otherwise be obtained. (*t*)

(*t*) 1 Russ. on C. & M. 3rd Ed. 631.

Art. 13.

The rules contained in Articles 60 and 61 of the last preceding Section shall, so far as they are applicable, apply as well to the persons mentioned in Article 11 of this Section as to the persons mentioned in those Articles.

ART. 14.

A person not being a peace officer, acting without warrant, is not justified in breaking open any outer door or window of a dwelling-house upon a mere suspicion of felony. (*u*)

(*u*) 4 Black. Comm. 293. The above Article is, perhaps, not necessary, as Article 11 specifies the cases in which a private person may break open doors or windows.

ART. 15.

A person not being a peace officer may in the presence or out of the actual presence of a peace officer or other person authorized to execute a warrant, aid him in executing the same, if the officer or other person so authorized be near at hand and acting in the execution of the warrant. (*x*)

(*x*) Hawk. P. C. b. 2, c. 13, s. 29; Lamb. 89; 2 Hale's P. C. 115; Rex *v.* Patience 7 Car. & P. 775; R. *v.* Whalley, ib. 245; Blatch *v.* Archer, Cowp. 63.

ART. 16.

A person not being a peace officer is bound to assist a peace officer, who demands his aid, in making an arrest or preventing the commission of any crime, whether such peace officer be acting under a warrant, or other lawful authority.

ART. 17.

A person not being a peace officer who, without warrant, has lawfully arrested any other person in pursuance of any Article of this Act is bound to take him, together with any property upon or in the custody of such other person, which he is authorized by any such Article to seize or detain, before some neighbouring justice of the peace having jurisdiction in the particular case, or to deliver him into the hands of a peace officer, whichever may be most reasonably done, due regard being had to speed and convenience; and in the latter case such peace officer shall take such person and property before some such neighbouring justice of the peace, due regard being had to speed and convenience. (*y*)

(*y*) 1 Hale, 589; 2 Hale, 77, 81; Hawk. b. 2, c. 13, s. 7; c. 16, s. 3.

SECTION 3.

Of Arrest by a Peace Officer without Warrant.

ART. 1.

A PEACE officer may arrest a party without warrant in all cases where a person, not being a peace officer, may so arrest by virtue of any Article of the last preceding Section: Arrest by a constable without warrant.

ART. 2.

Also on a reasonable charge made of a felony committed, or of grievous bodily harm caused, by the party arrested. (*a*)

(*a*) 1 Chitty C. L. 22; 6 B. & C. 635. He is bound to arrest one against whom a reasonable charge of felony is made. Doug. 345; Cald. 291; 6 T. R. 315; Hawk. P. C. b. 2, c. 12, s. 16; 4 Esp. c. 80; 1 East's P. C. 301; 2 Hale, 87, 91, 92.

ART. 3.

A peace officer may also, without warrant, arrest for or interpose for the prevention of any misdemeanor punishable by virtue of any Article of Chapter VI., or of Section 7 of Chapter XV., of the Act of Crimes and Punishments, committed, or attempted to be committed, in his view; (*b*) but cannot arrest for any such misdemeanor committed, or attempted to be committed, out of his view. (*c*)

(*b*) 1 Hale's P. C. 463; Hawk. P. C. b. 1, c. 31, s. 54; Fost. 310-11; 1 East's P. C. 303; Chitty's Burn's Just. tit. "Arrest," 3. The authorities lay down that a constable may arrest for a *breach of the peace* committed in his view, but cannot arrest for a *breach of the peace* committed out of his view. There is, however, an obscurity concerning the specific offences comprised under the terms "breach of the peace." We propose, therefore, to restrict the power of a constable to arrest without warrant for crimes of a less degree than felony to the misdemeanors referred to in the above Article. In cases of felony he has authority to arrest under the previous Articles of this Section.

(*c*) Cook *v.* Nethercote, 6 Car. & P. 741; R. *v.* Curvan, R. & M. C. C. R. 132; Fox *v.* Gaunt, 3 B. & Adolp. 798; R. *v.* Bright, 4 Car. & P. 387; but qu. and see 1 Esp. C. N. P. 540; Hawk. P. C. b. 2, c. 13, s. 8; Bac. Abrid. "Constable" C; 3 Camp. 420; 2 Hale, 90; 1 Russ. on C. & M. 3rd Ed. 295; and notes (*s*) and (*t*).

ART. 4.

Provided that it shall be lawful for any constable belonging to the Metropolitan Police Force to take into custody, without warrant, any person who, Persons charged with recent assaults may be appre-

hended within metropolitan police district without warrant.

within the limits of the Metropolitan Police District, shall be charged by any other person with committing any aggravated assault, in every case in which such constable shall have good reason to believe that such assault has been committed, although not within view of such constable, and that by reason of the recent commission of the offence a warrant could not have been obtained for the apprehension of the offender. (*d*)

(*d*) 2 & 3 Vic. c. 47, s. 65. Qu. as to extending this power generally.

ART. 5.

A peace officer, acting without warrant, may break open any outer door or window of a dwelling-house, if, after notification of his office and purpose and demand of admittance duly made, he cannot otherwise obtain admittance, in all cases where a person, not being a peace officer, may so act without warrant, and also for the purpose of apprehending any person in the cases specified in Article 2 of this Section. (*e*)

(*e*) 2 Hale's P.C. 90, 1; 4 Black. Comm. 292; 2 Hale, 95; Hawk. B. C. b. 2. c. 14, s. 8. It will be seen on reference to the note to Article 11 of the last Section, that the effect of this Article will be to curtail the present powers of a constable in entering houses.

ART. 6.

The dwelling-house of a third person is not privileged in the cases mentioned or referred to in the last preceding Article, provided the party sought be therein; and any outer door or window thereof may be broken for any purpose specified in the last preceding Article, if after such notification and demand as are mentioned in that Article, admittance cannot otherwise be obtained. (*f*)

(*f*) 1 Russ. on Cr. & Misd. 3rd Ed. 631.

ART. 7.

A peace officer, acting without warrant, may also, subject to the provisions of Article 5 of this Section, break open any outer door or window of a dwelling-house where any affray is made in such house, in his view or hearing, in order to suppress it; or when any of those who have made an affray in his view has fled to such house and is immediately pursued by such peace officer, in order to arrest such person. (*g*)

(*g*) 2 Hale's P. C. 95; Hawk. P. C. b. 2, c. 14, s. 8.

ART. 8.

The rules contained in Articles 60 and 61 of Section 1 of this Chapter, shall apply as well to peace officers acting under the provisions of Article 5 or 7 of this Section, as to the persons specified in such first-mentioned two Articles.

ART. 9.

A peace officer may also in the night-time, without warrant, arrest any person on a reasonable suspicion of felony, although no felony has been committed. (*h*)

(*h*) Qu. and see 3 Taunt. 14; 1 East, P.C. 303; Haw. P.C. b. 2, c. 12, s. 20; 5 Ed. III. c. 14; Bac. Ab. "Constable" C.; Chitty's C. L. 21. Chitty's Burn's Just. tit. "Arrest;" Stephen, C. L. 243. At Common Law no Constable is justified in taking up a night-walker. Bacon's Ab. "Tresspass," D. 3; 2 Ld. Raym. 1301.

ART. 10.

Persons who assault them in the execution of their duty.

A peace officer may, without warrant, arrest any person who assaults him whilst he is in the execution of his duty, and carry him before a neighbouring justice of the peace. (*i*)

(*i*) 1 Saund. 77, 8; 1 Taunt. 146; 2 Hale, 88. The last authority says, "and carry him to gaol," but the proceeding to make complaint before a magistrate appears to be the more direct course.

ART. 11.

Deputy.

What may be done by a peace officer may be done by his deputy. (*j*)

(*j*) 2 Hale, 88.

ART. 12.

Mode of proceeding to arrest.

A peace officer proceeding to arrest without warrant is bound, in cases where a person not being a peace officer may arrest without warrant, to notify to the party intended to be arrested the cause for such arrest, and, in cases where a person not being a peace officer has no authority to arrest without warrant, his official character as well, unless the party intended to be arrested be otherwise acquainted with it. (*k*)

(*k*) See Act of Crimes and Punishments, Chap. XV. Section 5, Arts. 8 & 9.

ART. 13.

Such notification is not necessary where the person arrested is in the actual commission of any offence, or where from other circumstances such person may be reasonably supposed to know the cause for which he is about to be arrested. (*l*)

(*l*) R. *v.* Howarth, R. & M. C. C., 207; 1 Russ. on C. & M. 3rd edit. 623.

ART. 14.

A peace officer who, without warrant, has lawfully arrested any person in pursuance of any Article of this Act, is to take him, together with any property upon or in the custody of such person which he is authorized to seize or detain, before some neighbouring justice of the peace having jurisdiction in the particular case, due regard being had to speed and convenience. (*m*)

(*m*) 2 Hale's P. C. 95, 96.

ART. 15.

By justices of the peace, coroners, &c.

Justices of the peace, sheriffs, and coroners, and all persons acting in their aid or assistance, may without warrant arrest a person, or any one who assaults them in the execution of their duty, in all cases where a peace officer may so arrest; and may do whatever a peace officer may do, in order to such arrest. (*n*)

(*n*) 2 Hale's P. C. 86; 1 Saund. 77, 8; 1 Taunt. 146; 4 Black. Comm. 289.

ART. 16.

Where any crime is committed in the presence of any justice of the peace, he may by word of mouth command any other person to arrest the offender, and may thereupon commit him, or, at his discretion, admit him to bail, in manner hereinafter in Section 5 of this Chapter mentioned. (*o*)

(*o*) See 1 Chitty's C. L. 25. A justice of the peace, who sees a felony or breach of the peace committed, may command any other person to apprehend such offender. 2 Hale, 86. The better course in analogy to the present practice seems to be, that the warrant should be issued by the magistrate on view, but should direct the taking before some other magistrate. According to Sir M. Hale, as stated above, the power given in this Article is restricted to cases of felony and breach of the peace. This rule has become somewhat unreasonable from the circumstance of the very shadowy distinction between many felonies and misdemeanors; and there would appear to be some obscurity as to the specific offences comprised under the term "breach of the peace." It is plain that the definition was not intended to comprise all offences which in indictments are alleged to have been committed against the peace of the Sovereign. It has appeared to us to be expedient, especially when it is considered that many offences which are at present felonies will in future be misdemeanors only by the Act of Crimes and Punishments, to extend the above power of a justice of the peace to all indictable crimes, or at all events, to make the term "breach of the peace" more definite by confining it, where not amounting to felony, to such misdemeanors as are punishable by virtue of any Article of Chap. VI., or Sect. 7 of Chap. XV. of the Act of Crimes and Punishments in the same manner as we have proposed to do in Art. 3 of this Section.

ART. 17.

A justice of the peace who has particular knowledge of any crime having been committed in his absence, is to prefer his complaint before some other justice of the peace. (*p*)

(*p*) A justice of the peace who of his own knowledge, or by information from others, knows or has just reason to suspect that a felony has been committed, may himself arrest and commit that person. 2 Hale's P. C. 87. Tamen Qu. and see Chitty's Burn's Just. tit. "Arrest," p. 270, citing the observation of Pratt, C. J. in R. *v.* Wilkes, 2 Wilson, 158.

We have, for the reasons stated by the Criminal Law Commissioners in their Eighth Report, p. 8, omitted Section 5 of the Act of Procedure relating to the antiquated proceeding of the Hue and Cry. The following is the Section alluded to:—

"SECTION 5.

"*Of the Hue and Cry.*

"ART. 1.

"The hue and cry consists in the due pursuit, according to the course prescribed by law, of felons "or such as have given a dangerous wound, (*a*) or assaulted and attempted to rob any person (*b*).

"(*a*) 4 Black Comm. 293.

"(*b*) 2 Hale's P. C. 100, 101; 3 Inst. 116; Chitty's Burn's Just. tit. 'Hue and Cry.'

"ART. 2.

"The hue and cry may be raised, with or without warrant, by any justice of the peace or constable, "or by any private person who knows a felony to have been committed, or a dangerous wound to have "been given, (*c*) or any person to have been assaulted and attempted to be robbed. (*d*).

"(*c*) 4 Black. Comm. 293; Hawk. P. C. b. 2, c. 12, s. 6; 1 Chitty's C. L. 27.

"(*d*) 2 Hale, 100, 101; 3 Inst. 116; Chitty's Burn's Just. tit. 'Hue and Cry.'

"ART. 3.

"A party who sees a felony committed is bound to use his best endeavours to arrest the felon, or to "raise the hue and cry. (*e*)

"(*e*) 1 Hale, 588.

Chap. I. Sec. 3.

" Art. 4.

" It is the duty of a party who applies to a justice of the peace for a warrant, or who raises the hue " and cry without making such application, to give such information as he can to the justice of the " peace in the former case, and to the constable of the vill in the latter, concerning the circumstances " of the offence, and the name and person of the offender. (*f*)

" (*f*) 2 Hale 100, 101 ; 3 Inst. 116 ; Chitty's Burn's Just. tit. ' Hue and Cry.'

" Art 5.

" On such information given, it is the duty of the constable to make search after the offender in sus- " pected places within his own vill, and to make pursuit with horse and foot; and if the offender be " not there taken, he is bound to give immediate notice to the constable of the next vill, and he to the " constable of the next, until the offender be found, or till they come to the sea-side : (*g*) and by such " next vill shall be understood every vill next round about the vill of the constable, who is to give notice " as aforesaid, and not the next vill only. (*h*)

" (*g*) Dalt. c. 54 ; Chitty's Burn's Just. tit. ' Hue and Cry.'

" (*h*) 3 Inst. 116 ; 4 Black. Comm. 294 ; 3 Edw. I. c. 9 ; but qy. if the pursuit need be by *horse* " and foot, since the repeal of the 13 Edw. I. st. 2, c. 1.

" Art. 6.

" A constable having obtained a warrant against a felon, may pursue him by the hue and cry into a " different county from that in which the warrant was granted, although such warrant be not indorsed " according to the provisions of Article 16 of Section 2 of this Chapter.

" Art. 7.

" If the constable be absent, the hue and cry may be raised without him. (*i*)

" (*i*) 1 Chitty's C. L. 28.

" Art. 8.

" If the party pursued by the hue and cry be in a dwelling-house, the like rules with respect to " breaking doors and windows, and the dwelling-houses of third persons, apply, which would apply if " the parties pursuing him were authorized by warrant to arrest him ; (*j*) and generally such parties " shall have the like powers, protection, and indemnification, as if they acted under the warrant of a " magistrate. (*k*)

" (*j*) 2 Hale's P. C. 102 ; 1 Chitty's C. L. 30 ; and Chitty's Burn's Justice, tit. ' Hue and Cry.'

" (*k*) 4 Black. Comm. 294 ; Steph. C. L. 244.

" Art. 9.

Protection.

" Pursuers on a hue and cry raised will be justified, although it turn out that no offence has been " committed, (*l*) provided there was reasonable cause of suspicion that one had been committed. (*m*)

" (*l*) 1 Chitt. C. L. 29.

" (*m*) 2 Hale, 104 ; 1 Chitt. C. L. 30.

" Art. 10.

" A person being in a town where the hue and cry is raised, or to which it comes, is bound to join in " the hue and cry. (*n*)

" (*n*) 1 Hale, 588."

Chap. I. Sec. 4.

SECTION 4.

Of Retaking on an Escape.

Art. 1.

Escape.

If a person who shall have been lawfully arrested in pursuance of any Article of this Act, shall escape or be rescued, it shall be lawful for the person from whose custody such prisoner so escaped or was rescued, to make fresh pursuit and retake him in any place, either within or without the jurisdiction where he was so in custody, and on any day and at any time of the day or night (*a*), and to deal with him as he might have done on an original taking. (*b*)

(*a*) See 2 Ld. Raym. 1028 ; 2 Salk. 626 ; 5 T. R. 25 ; Barnes, 373 ; Willes, 459 ; Chitty's Burn's Just. tit. " Lord's Day."

(*b*) Dalt. Just. 169.

Art. 2.

In order to retake any person within the meaning of the last preceding Article, the person so making fresh pursuit as therein is mentioned, may, if after notification of his purpose and demand of admittance duly made, he cannot otherwise obtain admittance, break open any outer door or window of a dwelling-house. (*c*)

(*c*) Fost. 320 ; 1 Salk. 79 ; 1 Hale, 459 ; Hawk. P. C. b. 2, c. 14, s. 9 ; 1 Russ. on C. & M. 3rd Ed. 632.

Art. 3.

The dwelling-house of a third person is not privileged in the case referred to in the last preceding Article, provided the party sought be therein ; and any outer door or window thereof may be broken for the purpose specified in that Article, if after such notification and demand as are therein mentioned admittance cannot otherwise be obtained.

ART. 4.

The rules contained in Articles 60 and 61 of Section 1 of this Chapter shall apply as well to persons proceeding to retake any party under the provisions of Article 1 of this Section as to persons acting under the provisions of such first-mentioned two Articles.

SECTION 5.

Examination before a Justice of the Peace—Commitment and Bail.

ART. 1.

Power to justices to summon witnesses to attend and give evidence.

IF it shall be made to appear to any justice of the peace, by the oath of any credible person, that any person within the jurisdiction of such justice is likely to give material evidence for the prosecution, [or if it shall be made to appear to any justice of the peace, by the statement of the accused, that any person within the jurisdiction of such justice is likely to give material evidence for the defence, *a*] and that any such person will not voluntarily appear for the purpose of being examined as a witness at the time and place appointed for hearing the charge against the accused, such justice may, and is hereby required to issue his summons (G. 1.) to such person, signed by and under the seal of such justice, requiring such person to be and appear at a time or place mentioned in such summons before the same justice, or before any other justice for the same county, who shall then be there, to testify what he shall know concerning the charge made against such accused party; and if any person so summoned shall neglect or refuse to appear at the time and place appointed by such summons, and no just excuse shall be offered for such neglect or refusal, then (after proof upon oath of such summons having been served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode,) it shall be lawful for any justice before whom such person should have appeared to issue a warrant (G. 2.) signed by and under the seal of such justice, to bring and have such person at a time and place to be therein mentioned before the justice who issued such summons, or before any other justice for the same county, who shall then be there, to testify as before-mentioned, and which warrant may, if necessary, be backed as in Section 1 of this Chapter is mentioned, in order to its being executed out of the jurisdiction of the justice who shall have issued the same; or if such justice shall be satisfied by evidence upon oath, that it is probable that such person will not attend to give evidence without being compelled so to do, then, instead of issuing such summons, it shall be lawful for him to issue his warrant (G. 3.) in the first instance, and which, if necessary, may be backed as in Section 1 of this Chapter is mentioned; and if on the appearance of such person so summoned before any such last-mentioned justice, either in obedience to such summons or upon being brought before him by virtue of such warrant, such person shall refuse to be examined upon oath, concerning the premises, or shall refuse to take such oath, or having taken such oath, shall refuse to answer such questions concerning the premises as shall then be put to him, without offering any just excuse for such refusal, any justice of the peace then present, and having jurisdiction there, may by warrant (G. 4) signed by and under the seal of such justice, commit the person so refusing to the common gaol or house of correction for the county, where such person so refusing shall then be, there to remain and be imprisoned for any time not exceeding seven days, unless he shall in the meantime consent to be examined, and to answer concerning the premises. (*b*)

If summons not obeyed, warrant may be issued to compel attendance.

In certain cases warrant may be issued in the first instance.

Persons appearing on summons, &c., refusing to be examined, may be committed.

(*a*) It appears to be by no means generally understood in the practice of justices of the peace, that there is any obligation to issue process for the attendance of witnesses called on behalf of a prisoner, to examine them if they appear voluntarily, to punish them if they refuse to give evidence, to take their examinations upon oath, to bind them ever by recognizance, or to transmit their depositions to the quarter sessions or assizes. There appear to be no authoritative rules requiring justices to take any such proceedings, and their legality, especially as regards the committal of witnesses for a prisoner refusing to give evidence, and the binding by recognizance, appears to be at least very questionable. We think that it is conducive to the fair and humane administration of justice, that the like powers should be given for the defence as for the prosecution in such cases, the rather as prisoners have not generally the like private means of obtaining the attendance of witnesses. We consider, moreover, that great advantage would thus be derived for the effectual prosecution of guilt, as the non-production of evidence by a prisoner shortly after his arrest, and the statements of his witnesses made before any long interval of delay, will often afford material topics for the consideration of the jury on his trial, should he produce witnesses then for the first time, or if the statements of his witnesses should materially vary from those made before they had time for consultation and preparation. Under these circumstances we have introduced the words between brackets.

(*b*) 11 & 12 Vic. c. 42, s. 16.

ART. 2.

The appearance of a witness to give evidence before a justice of the peace may also be obtained by means of a subpœna *ad testificandum* from the Crown Office. (*c*)

(*c*) See Corner's Forms, 152.

ART. 3.

As to the examination of witnesses.

Where any person shall appear or be brought before any justice of the peace charged with any crime, whether committed in England or upon the high seas, or on land beyond the seas, [or partly on the high seas or in any other place within the jurisdiction of the Admiralty of England or on land beyond the seas, and partly within the body of any county in England,] or whether such person appear voluntarily upon summons or have been apprehended, with or without warrant, or be in custody for the same or any other offence, such justice before he shall commit such accused person to prison for trial, or before he shall admit him to bail, shall, in the presence [and hearing] of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement (H.) on oath of those who shall know the facts and circumstances of the case [as nearly as may be in the very words used by them], and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by any justice taking the same; and any justice before whom any such witness shall appear to be so examined shall, before such witness [whether on behalf of the prosecution or defence] is examined, administer to such witness the usual oath, which such justice shall have full power and authority to do; and if upon the trial of the person so accused as first mentioned it shall be proved, by the oath of any credible witness, that any person whose deposition shall have been so taken is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same. (*d*)

Justice to administer oath or affirmation.

Depositions of persons who have died, or who are absent, may, in certain cases, be read in evidence.

(*d*) 11 & 12 Vic. c. 42, s. 17. The words between brackets appear to us to be proper to be added, and in the last case are rendered necessary by the alteration suggested in the last preceding Article.

ART. 4.

The allowing the assistance of counsel or an attorney to the accused is discretionary with the justice taking the depositions: Provided that where such assistance is refused, that fact is to be certified on the depositions by such justice; and no deposition of any witness for the prosecution, where counsel or an attorney has been refused to the accused, shall be read in evidence upon the trial of the accused, notwithstanding anything in the last preceding Article contained. (*e*)

(*e*) It is at present not compulsory upon justices to allow prisoners the assistance of counsel or attorney; but it is very rare that such a privilege is denied. It appears that the power of refusal has been rested upon reasons connected with preliminary inquiries in former times, in which the practice was different from that which prevails at the present day, especially as regards the secrecy of the inquiry before the justice, grounded on the fear of the escape of accomplices. The assistance of counsel or attorney, whether in matters of law or fact, seems very conducive to the proper understanding of a case, even in its preliminary stages, and to be highly important both as regards the dismissal of the prisoner or his admission to bail, or the subsequent use of depositions, and especially so whenever, in consequence of the death or illness of a witness, his deposition before a magistrate is receivable in evidence upon a trial. We submit that if the allowance of counsel or an attorney to a prisoner is to remain discretionary, at all events the right to read the depositions of dead, &c., witnesses ought to be restricted as in the above Article.

ART. 5.

After examination of the accused, justice to read depositions taken against him, and caution him as to any statement he may make;

After the examinations of all the witnesses as in Article 3 of this Section is mentioned shall have been completed, any justice of the peace by or before whom such examination shall have been so completed shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: "Having heard the evidence, do you wish to say anything in answer to the charge? "you are not obliged to say anything; but if you choose to do so, whatever you "say will be taken down in writing, and may be given in evidence against you "upon your trial;" and whatever the prisoner shall then say in answer thereto shall be taken down in writing (I.), and read over to him, and shall be signed

by any such justice, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter in Article 10 of this Section is mentioned; and afterwards upon the trial of the accused person the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the justice by whom the same shall purport to be signed did not in fact sign the same. (*f*)

(*f*) 11 & 12 Vic. c. 42, s. 18, in part.

ART. 6.

and inform him that he has nothing to hope or fear from either promise or threat.

Provided that every such justice before the accused shall make any such statement as in the last preceding Article is mentioned, shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat. (*g*)

(*g*) 11 & 12 Vic. c. 42, s. 18, in part. We have not altered the provisions which have been so recently sanctioned by the legislature, as to the mode of examining prisoners by justices of the peace. We think, however, that some misconception may arise in consequence of first prescribing a formulary for interrogating a prisoner, and afterwards adding further particulars, which must be addressed to the prisoner in order to render his examination of any avail in evidence. We think that the cautions required will generally have the effect of deterring prisoners from stating the truth respecting their offences; a subject upon which the law of England is sufficiently indulgent, and in which it is at variance with the procedure of most other countries. We conceive that it is highly expedient to the administration of justice to obtain confessions, intentional or unintentional, from prisoners, and that the only circumstance to be guarded against is to take away inducements for a prisoner to unjustly accuse himself, a line of conduct not conformable to experience, and very seldom adopted, unless under very cogent temptations.

ART. 7.

Provided also that any statement which the accused shall make as in Article 5 of this Section is mentioned is not to be upon oath, and if it be so taken cannot afterwards be given in evidence against him upon his trial.

ART. 8.

Provided also that nothing in the last three preceding Articles contained shall prevent the prosecutor in any case from giving in evidence any admission or confession, or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person. (*h*)

(*h*) 11 & 12 Vic. c. 42, s. 18, in part.

ART. 9.

Place where examination taken not to be deemed an open Court, and no person to remain without consent.

The room or building in which any justice shall take such examinations and statement as hereinbefore in this Section are mentioned shall not be deemed an open Court for that purpose; and it shall be lawful for any such justice, in his discretion, to order that no person shall have access to or be or remain in such room or building without the consent or permission of such justice, if it appear to him that the ends of justice will be best answered by so doing. (*i*)

(*i*) 11 & 12 Vic. c. 42, s. 19.

ART. 10.

Power to justice to bind over the prosecutors and witnesses by recognizance.

It shall be lawful for any justice before whom any witness shall be examined as hereinbefore in this Section is mentioned, to bind by recognizance (K. 1.) the prosecutor and every such witness [not being an infant or a married woman (*j*)] appear at the next court of oyer and terminer or gaol delivery, or superior court of a county palatine, or court of general or quarter sessions of the peace, at which the accused is to be tried, then and there to prosecute, or to prosecute and give evidence, or to give evidence, as the case may be, against the party accused, which recognizance shall particularly specify the profession, art, mystery, or trade of every such person entering into or acknowledging the same, together with his Christian and surname, and the parish, township, or place of his residence, and if his residence be in a city, town, or borough, the recognizance shall also particularly specify the name of the street, and the number (if any) of the house in which he resides, and whether he is owner or tenant thereof or a lodger therein; and such recognizance, being duly acknowledged by the person so entering into the same, shall be subscribed by any justice before whom the same shall be acknowledged, and a notice (K. 2.) thereof, signed by such justice, shall at the same time

Chap. I. Sec. 5.

Recognizance, depositions, &c. to be transmitted to the Court in which the trial is to be had.

be given to the person bound thereby; and the several recognizances so taken, together with the written information (if any), the depositions, the statement of the accused, and the recognizance of bail (if any) in every such case, shall be delivered by such justice, or he shall cause the same to be delivered to the proper officer of the Court in which the trial is to be had, before or at the opening of such Court on the first day of the sitting thereof, or at such other time as the Judge, Recorder, or Justice who is to preside in such Court at such trial shall order and appoint. (*k*)

(*j*) As to the reason for excepting infants and married women, see the note to Article 13 of this Section.

(*k*) 11 & 12 Vic. c. 42, s. 20, in part.

ART. 11.

Witnesses refusing to enter into recognizances may be committed.

If any witness shall refuse to enter into or acknowledge such recognizance as in the last preceding Article is mentioned, it shall be lawful for any justice before such witness shall be examined as hereinbefore in this Section is mentioned, by his warrant (L. 1.), to commit him to the common gaol or house of correction for the county in which the accused party is to be tried, there to be imprisoned and safely kept until after the trial of such accused party, unless in the meantime such witness shall duly enter into such recognizance before some one justice for the county in which such gaol or house of correction shall be situate. (*l*)

(*l*) 11 & 12 Vic. c. 42, s. 20, in part.

ART. 12.

Provided that if afterwards, from want of sufficient evidence in that behalf or other cause, any justice before whom such accused party shall have been brought, shall not commit him or hold him to bail for the crime with which he is charged, it shall be lawful for such justice or any other justice for the same county, by his order (L. 2.) in that behalf, to order and direct the keeper of the common gaol or house of correction where such witness shall be so in custody, as in the last preceding Article is mentioned, to discharge him from the same, and such keeper shall thereupon forthwith discharge him accordingly. (*m*)

(*m*) 11 & 12 Vic. c. 42, s. 20, in part.

ART. 13.

Power to justice to order attendance at trial of infants and and married women.

It shall be lawful for any justice of the peace before whom any witness, being an infant or a married woman, shall be examined as hereinbefore in this Section is mentioned, by an order in writing (M.) signed by such justice, to direct any such witness to appear at the next court of oyer and terminer or gaol delivery, or superior court of a county palatine or court of general or quarter sessions of the peace at which the accused is to be tried, then and there to give evidence against the party accused; and in case such witness shall refuse or neglect, without sufficient cause, to obey such order, he shall forfeit and pay such fine not exceeding £ , as the Court before which he or she is so directed to appear shall set on him. (*n*)

(*n*) The present practice of binding prosecutors and witnesses over to the quarter sessions or assizes upon their own recognizances, that is, the requiring a party voluntarily to confess himself indebted to the Queen, and committing him for a contempt if he refuses, seems a very inconvenient device of procedure; and although the commitment in such cases may vindicate the dignity of the magistrate, yet it does not further the main object in view, that of procuring the attendance of the witness at the quarter sessions or assizes. Besides, in the cases of married women and persons of tender age, technical difficulties have to be encountered. The course in practice in the case of a married woman is to require her to procure some other person or persons to be bound for her. A minor, however, it appears (see Mr. Paynter's answers to the questions on Criminal Procedure circulated by the Criminal Law Commissioners, Appendix to their Eighth Report, p. 242), may be bound by recognizance. These difficulties would be removed, and the mode of compelling attendance would be more simple and reasonable, by substituting, at all events in the cases of married women and infants, an order in the nature of a subpœna for a recognizance, and providing that any neglect or refusal to obey it should be punished by a fine of limited extent, to be inflicted by the Court before which the prosecutor or witness is ordered to appear.

ART. 14.

Power to justice to remand the accused from time to time, not exceeding eight days, by warrant.

If, from the absence of witnesses or from any other reasonable cause, it shall become necessary or advisable to defer the examination or further examination of the witnesses for any time, it shall be lawful for any justice before whom the accused shall appear or be brought by his warrant (N. 1.), from time to time to remand the party accused for such time, not exceeding eight clear days, as by such justice in his discretion shall be deemed reasonable, to the common gaol or house of correction, or other prison, lock-up house, or place of security in the county for

which such justice shall then be acting; or if the remand be for a time not exceeding three clear days, it shall be lawful for such justice verbally to order the constable or other person in whose custody such party accused may then be, or any other constable or person to be named by such justice in that behalf, to continue or keep such accused party in his custody, and to bring him before the same or any other justice who shall be there acting at the time appointed for, or for continuing, such examination. (*o*)

If remand be for three days only, by verbal order.

(*o*) 11 & 12 Vic. c. 42, s. 21 in part. The power to remand contained in the above Article appears to render unnecessary the insertion of Article 16 of Section 7 of Chapter I. of the Act of Procedure. That Article is as follows:—

"ART. 16.

"If any justice or justices of the peace before whom any person and any property suspected to be "stolen or otherwise fraudulently taken, obtained, converted or received, shall be conveyed in manner "in Article 10 of Section 3 of this Chapter mentioned, shall, upon examination and inquiry, have cause "to suspect that the said property was stolen or fraudulently taken, obtained, converted or received, it "shall and may be lawful for such justice or justices to commit such person into safe custody, for any "time not exceeding the space of six days, in order to be further examined; and if, upon either of the "said examinations it shall appear to the satisfaction of such justice or justices that the said property "was stolen, or fraudulently taken, obtained, converted or received, the said justice or justices is, and "are hereby authorized and required to commit the party offending to the common gaol or house of "correction of the county, riding, division, city, liberty, town or place wherein the offence shall be com-"mitted, there to be dealt with according to law. 30 Geo. II. c. 24, s. 7, in part."

Stolen goods, pawning, &c.

We have also omitted Article 17 of the same Section, there appearing to us to be no sufficient reason for requiring two witnesses, and limiting the amount of bail in the case of the offence there referred to. The following is the Article:—

"ART. 17.

"Any person offending against the provisions of Section 3 of Chapter III. of the Act of Crimes and "Punishments, shall, upon proof thereof before any justice of the peace by two or more credible wit-"nesses, find two sureties to be bound by recognizances in the penal sum of 50*l.* to answer for such "offence, and in default of such sureties shall be committed to prison, there to remain till the next "general or quarter sessions, at which said sessions he is to be tried. 52 Geo. III. c. 155. See also "1 W. & M. c. 18, s. 18."

Disturbing religious assemblies.

ART. 15.

Provided that any justice before whom the accused shall appear or be brought may order such accused party to be brought before him or before any other justice for the same county, at any time before the expiration of the time for which such accused party shall be so remanded, as in the last preceding Article is mentioned, and the gaoler or officer in whose custody he shall then be shall duly obey such order. (*p*)

(*p*) 11 & 12 Vic. c. 42, s. 21, in part.

ART. 16.

Provided also, that instead of detaining the accused party in custody during the period for which he shall be remanded, as in Article 14 of this Section is mentioned, any justice of the peace before whom such accused party shall appear or be brought, may discharge him upon his entering into a recognizance (N. 2. 3.), with or without a surety or sureties, at the discretion of such justice, conditioned for his appearance at the time and place appointed for the examination or for the continuance of the examination of the witnesses; and if such accused party shall not afterwards appear at the time and place mentioned in such recognizance, then such justice or any other justice of the peace who may then and there be present, upon certifying (N. 4.) on the back of the recognizance the non-appearance of such accused party, may transmit such recognizance to the clerk of the peace of the county within which such recognizance shall have been taken, to be proceeded upon in like manner as other recognizances, and such certificate shall be deemed sufficient *primâ facie* evidence of such non-appearance of the accused party. (*q*)

Party accused may be admitted to bail on the examination being adjourned.

If party does not appear upon recognizance, justice may transmit the same to the clerk of the peace.

(*q*) 11 & 12 Vic. c. 42, s. 21, in part.

ART. 17.

Whensoever a person shall appear or shall be brought before any justice of the peace in the county wherein such justice shall have jurisdiction, charged with a crime alleged to have been committed by him in any county in England wherein such justice shall not have jurisdiction, it shall be lawful for such justice and he is hereby required to examine such witnesses, and receive such evidence in proof of such charge as shall be produced before him, within his jurisdiction; and if, in his opinion, such testimony and evidence shall be sufficient proof of the charge made against such accused party, such justice shall thereupon commit him to the common gaol or house of correction for the county where the crime is alleged to have been committed, or shall admit him to bail, as hereinafter

If a person be apprehended in one county on charge of an offence committed in another, he may be examined in the former;

and if evidence be deemed sufficient, may be committed to prison.

Chap. I. Sec. 5.

in this Section is mentioned, and shall bind over the prosecutor (if he have appeared before him) and the witnesses by recognizance [or, where any of the latter shall be an infant or married woman, shall make such order (*r*)] accordingly, as is hereinbefore in this Section mentioned; but if such testimony and evidence shall not, in the opinion of such justice, be sufficient to put the accused party upon his trial for the crime with which he is so charged, then such justice shall bind over, by recognizance [or shall order (*r*)] such witnesses as he shall have examined, to give evidence as hereinbefore in this Section is mentioned, and such justice shall, by warrant (O. 1.) signed by and under the seal of such justice, order such accused party to be taken before any justice of the peace in and for the county where and near unto the place where the crime is alleged to have been committed, and shall at the same time deliver the information and complaint, and also the depositions and recognizances so taken by him, to the peace officer who shall have the execution of such last-mentioned warrant, to be by him delivered to any justice before whom he shall take the accused in obedience to such warrant, and which depositions and recognizances shall be deemed to be taken in the case, and shall be treated to all intents and purposes as if they had been taken by or before such last-mentioned justice, and shall, together with such depositions and recognizances as such last-mentioned justice shall take in the matter of such charge against the accused party, be transmitted to the clerk of the court where the accused party is to be tried, in the manner and at the time hereinbefore in Article 10 of this Section mentioned, if such accused party shall be committed for trial upon such charge, or shall be admitted to bail; and in case such accused party shall be taken before any justice last mentioned by virtue of such last-mentioned warrant, the peace officer or other person to whom such warrant shall have been directed, and who shall have conveyed such accused party before such last-mentioned justice, shall be entitled to be paid his costs and expenses of conveying such accused party before such justice; and upon such peace officer or other person producing such accused party before such justice, and delivering him into the custody of such person as such justice shall direct or name in that behalf, and upon such peace officer delivering to such justice the warrant, information (if any), depositions, and recognizances before mentioned, and proving by oath the handwriting of any justice who shall have subscribed the same, such justice to whom such accused party is so produced shall thereupon forthwith ascertain the sum which ought to be paid to such peace officer or other person for conveying such accused party and taking him before such justice, as also his reasonable costs and expenses of returning, and thereupon such justice shall make an order (O. 2.) upon the treasurer of the county, riding, division or liberty, city, borough, or place, or if such city, borough, or place shall be contributory to the county rate of any county, riding, division, or liberty, then upon the treasurer of such county, riding, division, or liberty respectively to which it is contributory, for payment to such peace officer or other person of the sum so ascertained to be payable to him in that behalf; and such treasurer, upon such order being produced to him, shall pay the amount to such peace officer or other person producing the same, or to any person who shall present the same to him for payment: Provided, that if such last-mentioned justice shall not think the evidence against such accused party sufficient to put him upon his trial, and shall discharge him without holding him to bail, every such recognizance so taken by the first-mentioned justice, as hereinbefore in this Article is mentioned, shall be null and void. (*s*)

If insufficient, to be brought before some justice in the latter county.

As to payment of expenses of conveying the accused into the proper county, &c.

(*r*) These words have been added, in consequence of the introduction of Article 13 of this Section.
(*s*) 11 & 12 Vic. c. 42, s. 22.

ART. 18.

Power to justice to admit to bail persons charged with felony and certain misdemeanours.

Where any person shall appear or be brought before a justice of the peace charged with any felony, or with any assault with intent to commit any felony, or with any attempt to commit any felony, or with any misdemeanor punishable by virtue of [any Article of Section 9 of Chapter II. (*t*)] or any Article of Chapter XVIII. of the Act of Crimes and Punishments (*u*), or with perjury or subornation of perjury, or with concealing the birth of a child by secret burying or otherwise, or with wilful or indecent public exposure of the person, or with riot, or with assault in pursuance of a conspiracy to raise wages, or assault upon a peace officer in the execution of his duty, or upon any person acting in his aid, or with neglect or breach of duty as a peace officer, or with any misdemeanor for the prosecution of which the costs may be allowed out of the county rate, such justice of the peace may, in his discretion, admit such person to bail, upon his

procuring and producing such surety or sureties as in the opinion of such justice will be sufficient to ensure the appearance of such accused person at the time and place when and where he is to be tried for such offence (*v*); and thereupon such justice shall take the recognizance (P. 1. 2.) of the accused person and his surety or sureties, conditioned for the appearance of such accused person at the time and place of trial, and that he will then surrender and take his trial, and not depart the court without leave. (*w*)

(*t*) These words render unnecessary the insertion of an Article embodying the provisions of Article 11 of Section 7 of Chapter I. of the Act of Procedure.

(*u*) The 11 & 12 Vict. c. 42, s. 23, at present confines the discretion to bail or commit in the case of misdemeanors being fraudulent appropriations of property to obtaining, or attempting to obtain, by false pretences, and receiving property stolen or obtained by false pretences, but upon principle we think the same discretion should be extended to embezzlement and other misdemeanors within the Chapter of the Act of Crimes and Punishments relating to fraudulent appropriations, and have altered the law accordingly.

(*v*) The Legislature appears by the above enactment to have intended to leave the sufficiency of the sureties in all cases to the opinion of the justice who admits the accused to bail; the following Articles of the Act of Procedure seem therefore to be no longer required:—

"Chap. I. Sec. 7.—Art. 44.

Who may be bail.

"Every householder possessed of sufficient property to answer the sum in which he is bound (of "which the court, magistrate or magistrates shall judge, and for that purpose may examine such house-"holder upon oath as to his means), may be surety for any person charged with or suspected to have "committed any crime."

"Art. 45.

"No person who has been convicted of any crime by which he is become infamous shall be allowed "to be surety for any person so charged or suspected."

"Art. 46.

"Nor shall a married woman, or an infant or a prisoner in custody."

(*w*) 11 & 12 Vic. c. 42, s. 23, in part.

Art. 19.

Justices may admit to bail in the like cases after commitment for trial.

Where a person charged with any crime, shall be committed to prison to take his trial for the same, it shall be lawful, at any time afterwards, and before the first day of the sitting or session at which he is to be tried, or before the day to which such sitting or session may be adjourned, for any justice of the peace who shall have signed the warrant for his commitment, in his discretion, to admit such accused person to bail in manner in the last preceding Article mentioned; or if any such committing justice shall be of opinion that for any of the crimes in the last preceding Article mentioned such accused person ought to be admitted to bail, he shall in such cases [and all other cases of misdemeanors (*x*)] certify (P. 3.) on the back of the warrant of commitment his consent to such accused party being bailed, stating also the amount of bail which ought to be required, [whereupon (*y*)] it shall be lawful for any justice of the peace, attending or being at the gaol or prison where such accused party shall be in custody, on production of such certificate, to admit such accused person to bail in manner in the last preceding Article mentioned; or if it shall be inconvenient for the surety or sureties in such a case to attend at such gaol or prison to join with such accused person in the recognizance of bail, then such committing justice may make a duplicate of such certificate (P. 4.), and upon the same being produced to any justice of the peace for the same county, it shall be lawful for such last-mentioned justice to take the recognizance of the surety or sureties in conformity with such certificate, and upon such recognizance being transmitted to the keeper of such gaol or prison, and produced, together with the certificate on the warrant of commitment to any justice of the peace attending or being at such gaol or prison, it shall be lawful for such last-mentioned justice thereupon to take the recognizance of such accused party, and to order him to be discharged out of custody as to that commitment, as hereinafter in Article 26 of this Section is mentioned. (*z*)

(*x*) The words between brackets do not appear to be wanted. See next Article, where if, in case of other misdemeanors than those specified above, the party has been committed to prison, he is entitled to be bailed on application to a visiting justice, &c., without any certificate of the committing justice being necessary. The above words appear to have been inserted inadvertently.

(*y*) This word is not in the Act, but some such word appears to be wanted.

(*z*) 11 & 12 Vic. c. 42, s. 23, in part.

Art. 20.

Justice may admit to bail persons charged with other misdemeanours.

Where any person shall be charged before any justice of the peace with any misdemeanor other than those in Article 18 of this Section mentioned, such justice, after taking the examinations in writing as hereinbefore in this Sec-

Chap. I. Sec. 5.

tion is mentioned, instead of committing him to prison for such crime, shall admit him to bail in manner in such Article 18 mentioned; or if he have been committed to prison, and shall apply to any one of the visiting justices of such prison, or to any other justice of the peace for the same county, before the first day of the sitting or session at which he is to be tried, or before the day to which such sitting or session may be adjourned, to be admitted to bail, such justice shall accordingly admit him to bail in manner in that Article mentioned. (*a*)

(*a*) 11 & 12 Vic. c. 42, s. 23, in part.

ART. 21.

Certain recognizance to be transmitted to committing justices.

In all cases where an accused person in custody shall be admitted to bail by a justice of the peace other than any committing justice, such justice of the peace so admitting him to bail shall forthwith transmit the recognizance or recognizances of bail to any committing justice to be by him transmitted, with the examinations, to the proper officer. (*b*)

(*b*) 11 & 12 Vic. c. 42, s. 23, in part.

ART. 22.

Provided that where the accused person shall be an infant, a married woman, or in any prison, it shall be sufficient that any such recognizance as in Articles 18, 19, and 20 of this Section is mentioned be entered into by *two* sureties only. (*c*)

(*c*) 2 Hale's P. C. 126; Chitty's Burn's Justice, tit. "Bail."

ART. 23.

Excessive bail not to be required.

Provided also that excessive bail shall not be required. (*d*)

(*d*) 1 W. & M., sess. 2, c. 2; 6 Mod. 179; Hawk. P. C., b. 2, c. 15, s. 13–24; Bac. Abrid. "Bail F.;" Com. D. "Bail" F. 5, K. 6; 3 Bos. & Pul. 551. The recent Act 11 and 12 Vict., c. 42, s. 23, making no mention of the subject, it would seem that it was thought by the legislature that there was no occasion to caution justices against taking excessive bail, inasmuch as a judge could liberate upon taking more reasonable bail. That Act merely directs that they shall take sufficient bail. The provision, however, embodied in the above Article being contained in so important an Act as the one enacting the declaration contained in the Bill of Rights, we have thought it proper to retain that Article of the Act of Procedure.

ART. 24.

No bail in cases of treason but by order of Secretary of State, &c.

Provided also, that no justice or justices of the peace shall admit any person to bail for treason, nor shall such person be admitted to bail, except by order of one of Her Majesty's Principal Secretaries of State, or by Her Majesty's Court of Queen's Bench at Westminster, or a Judge thereof in vacation. (*e*)

(*e*) 11 & 12 Vic. c. 42, s. 23, in part.

ART. 25.

Where defendant entitled to traverse

Provided also, that when in cases of misdeameanor, the defendant shall be entitled to a traverse at the next assizes or quarter sessions, and shall not be bound to take his trial until the second assizes or sessions, in every such case the recognizance (P. 1.) of bail shall be conditioned that he shall appear and plead at the next assizes or sessions, and then traverse the indictment, and that he shall surrender and take his trial at such second assizes or sessions, unless such accused party shall, before he enter into such recognizance, choose and consent to take his trial at such first assizes or sessions, in which case the recognizance may be in the ordinary form in Article 18 of this Section mentioned. (*f*)

(*f*) 11 & 12 Vic. c. 42, s. 23, in part.

ART. 26.

When justice admits a person to bail after commitment, a writ of deliverance shall be sent to him, if not detained for any other offence.

Where a justice of the peace shall admit to bail any person who shall then be in any prison charged with the crime for which he shall be so admitted to bail, such justice shall send to or cause to be lodged with the keeper of such prison a warrant of deliverance (P. 5.), signed by and under the seal of such justice, requiring such keeper to discharge the person so admitted to bail, if he be detained for no other crime, and upon such warrant of deliverance being delivered to or lodged with such keeper, he shall forthwith obey the same. (*g*)

(*g*) 11 & 12 Vic. c. 42, s. 24.

ART. 27.

If, after hearing evidence against the accused, it is not thought sufficient to

When all the evidence offered upon the part of the prosecution against the accused party shall have been heard, if the justice of the peace who shall hav taken the same shall be of opinion that it is not sufficient to put such accuse

party upon his trial for any crime, such justice shall forthwith order such accused party, if in custody, to be discharged as to the information then under inquiry; but if such justice, after hearing such evidence [and any which may be offered on the part of the accused] shall be of opinion that such evidence is sufficient to put the accused party upon his trial for a crime [although a different one from that with which he was originally charged], or if the evidence given raise a strong or probable presumption of the guilt of such accused party, then such justice shall, by his warrant (Q. 1.), commit him to the common gaol, house of correction, or other prison for the county, to which, by virtue of any Article hereinafter in this Section contained, he may be committed; or, in the case of a crime committed on the high seas, or on land beyond the seas, [or partly on the high seas or in any place within the jurisdiction of the Admiralty of England or on land beyond the seas, and partly within the body of any county in England], to the common gaol of the county within which such justice shall have jurisdiction, to be there safely kept until he shall be thence delivered by due course of law, or admit him to bail as hereinbefore in this Section is mentioned. (*h*)

warrant commitment, he shall be discharged; but if evidence considered sufficient, justice shall, by warrant, commit the accused for trial.

(*h*) 11 & 12 Vic. c. 42, s. 25. The words between brackets appear to us to be proper to be added.

Art. 28.

Every such warrant (Q. 1.) as in the last preceding Article is mentioned shall be signed by and under the seal of the committing justice, and be directed to any such peace officer as a warrant of arrest may be directed to, and also to the gaolor, keeper, or governor of the common gaol, house of correction or other prison to which such justice may commit, either by his name or official description, and shall state shortly, either in legal terms or in substance, the crime with which such accused party is charged, referring to the Article of the Act of Crimes and Punishments by which it is made punishable, and shall name or otherwise describe the accused, and shall order such peace officer to deliver him, together with such warrant, to such gaoler, keeper or governor; and such gaoler, keeper or governor to receive and safely keep him until he be delivered by due course of law.

Art. 29.

Insufficient bail.

If through mistake or fraud insufficient bail has been taken, or if the surety or sureties become afterwards insufficient, the accused may be ordered by any justice of the peace having jurisdiction to find sufficient surety or sureties, and in default may be committed to the common gaol, house of correction, or other prison, in manner in Article 27 of this Section mentioned.

Art. 30.

Notice of bail.

With a view to ensuring the sufficiency of the surety or sureties, the justice of the peace before he admits the accused to bail, under the provisions of any Article of this Section, may, in his discretion, order that reasonable notice of such surety or sureties shall be given to the prosecutor. (*i*)

(*i*) Chitty's Burn's Just., tit. "Bail." See the 30 Geo. II. c. 24, s. 17, which required 24 hours' notice of bail in offences as to false pretences and sending threatening letters with intent to extort money, &c.; but it appears to be repealed by the 7 & 8 Geo. IV. c. 27, as regards bail in case of false pretences, that Act having repealed so much of the 30 Geo. II. c. 24, "as relates to obtaining by "false pretence or pretences any property as therein mentioned." As to sending threatening letters, however, it appears to be still in force, though the offence itself appears to have been incidentally repealed by the 7 & 8 Geo. IV. c. 29, s. 8, which imposes a heavier punishment in respect of that offence than the one provided by the 30 Geo. II. c. 24. In all probability the 7 & 8 Geo. IV. c. 27, was intended to have repealed the 30 Geo. II. c. 24, as to the latter as well as the former offence, since the 7 & 8 Geo. IV. c. 29, in connexion with which the 7 & 8 Geo. IV. c. 27, was passed, regulates both those offences. At all events, we submit that there is nothing peculiar in these two offences to warrant any special provisions as to bail different from those which exist in other cases, and we have, therefore, omitted the section of the 30 Geo. II. c. 24, before referred to.

Art. 31.

Bail by Court of Queen's Bench.

The Court of Queen's Bench, or a judge thereof, has also a discretionary power of admitting to bail any prisoner charged with having committed, or with being suspected to have committed any crime, who shall be brought before such court or judge by virtue of a writ of *habeas corpus*, or otherwise, according to the course of such court. (*k*)

(*k*) Chitty's Burn's Just., tit. "Bail," citing Leach, 168; Comb. 111; 2 Strange, 1242; Cowp. 333; Burr, 2179; 2 Chit. Rep. 110; 1 Wils, 29; 3 East, 163; 5 T. R. 169, and see Corner's Practice, p. 46.

ART. 32.

The Court of Queen's Bench, or a judge thereof, has also a discretionary power, on just cause shown, of directing a party not in custody to be admitted to bail on his surrendering to a warrant. (*l*)

(*l*) Corner's Practice, 48.

ART. 33.

The several rules hereinbefore in this Section contained as to the amount, sufficiency, and notice of bail, shall apply to bail under the provisions of the last two preceding Articles.

ART. 34.

When sureties may discharge themselves by surrender of principal.

The surety or sureties for any person may, if he or they fear his escape, discharge himself or themselves by taking and surrendering such person before the court, judge or justice of the peace, by which or by whom he has been bailed, and by which or by whom he may thereupon be committed to the common gaol, house of correction, or other prison, until he be thence delivered by due course of law, unless he find another or other sufficient surety or sureties, in which case such court, judge or justice may again admit him to bail.

ART. 35.

Provided also that where any person shall be so surrendered as in Article 34 of this Section is mentioned, his surety or sureties shall not be discharged until such person shall be committed, or again admitted to bail as therein is mentioned.

ART. 36.

Regulations for conveying prisoners to gaol.

The peace officer to whom any such warrant of commitment as hereinbefore in any Article of this Section is mentioned, shall be directed, shall convey the accused person therein named or described to the gaol or other prison mentioned in such warrant, and there deliver him, together with such warrant, to the gaoler, keeper or governor of such gaol or prison, or to his deputy, who shall thereupon give such peace officer so delivering such prisoner into his custody a receipt (Q. 2.) for such prisoner, setting forth the state and condition in which such prisoner was when he was delivered into the custody of such gaoler, keeper, governor or deputy;

As to payment of costs conveying prisoners to prison.

and where such peace officer shall be entitled to his costs or expenses for conveying such person to such prison it shall be lawful for the Court, judge or justice who shall have committed the accused party, or for any justice of the peace in and for the county, riding, division or other place of exclusive jurisdiction wherein the crime is alleged in such warrant to have been committed, to ascertain the sum which ought to be paid to such peace officer for conveying such prisoner to such gaol or prison, and also the sum which should reasonably be allowed him for his expenses in returning, and thereupon such Court, judge, or justice shall make an order (Q. 2.) upon the treasurer of such county, riding, division, liberty, or place of exclusive jurisdiction, or if such place of exclusive jurisdiction shall be contributory to the county-rate of any county, riding, or division, then upon the treasurer of such county, riding or division respectively, or in the county of Middlesex, upon the overseers of the poor of the parish or place within which the crime is alleged to have been committed, for payment to such peace officer of the sums so ascertained to be payable to him in that behalf; and such treasurer or overseers, upon such order being produced to him or them respectively, shall pay the amount thereof to such peace officer producing the same, or to any person who shall present the same to him or them for payment: Provided that if it shall appear to the Court, judge or justice by which or by whom any such warrant of commitment against such prisoner shall be granted, that such prisoner has money sufficient to pay the expenses, or some part thereof, of conveying him to such gaol or prison, it shall be lawful for such Court, judge or justice, in their or his discretion, to order such money or a sufficient part thereof to be applied to such purpose. (*m*)

(*m*) See 11 & 12 Vic. c. 42, s. 26.

ART. 37.

Committal to gaol.

The committal of any person for trial under any Article of this Act shall (unless it be otherwise specially provided) be to the common goal. (*n*)

(*n*) 5 Hen. IV. c. 10.

ART. 38.

Provided that the Court of Queen's Bench may commit to any prison in England. (*o*)

(*o*) Bothe's Case, Moore 666; Hawk. P. C., b. 2, c. 16, s. 5; and see the Habeas Corpus Act, 31 Car. II. c. 2.

ART. 39.

Power to commit to house of correction near the place of trial.

Provided also that where the assizes or sessions at which any person is intended to be tried are holden at any place distant from the common gaol of the county, it shall be lawful for any justice of the peace, acting within his jurisdiction, to commit for safe custody to any house of correction, situate near to the place where such assizes or sessions are intended to be holden, any person charged before him with any offence triable at such assizes or sessions; and that whensoever any such person shall be committed to any such house of correction for trial at such assizes or sessions, the keeper of such house of correction shall deliver to the judges of assize, or justices at sessions, a calendar of all prisoners in his custody for trial at such assizes or sessions respectively, in the same way that the sheriff of the county would be by law required to do if such prisoners had been committed to the common gaol of the county. (*p*)

(*p*) 5 & 6 Will. IV. c. 38, s. 3, in part.

ART. 40.

Power to commit from a liberty to the county house of correction, when inhabitants of liberty are contributory to county house of correction.

Provided also that in all cases where any person, liable by law to be committed to the house of correction shall be apprehended within any liberty, city, or town corporate, whose inhabitants are contributory to the support and maintenance of the house or houses of correction of the county, riding, or division in which such liberty, city, or town corporate is situate, it shall be lawful for any justice of the peace of such liberty, city, or town corporate to commit such person to the house of correction of the county, riding, or division in which such liberty, city, or town corporate is situate. (*q*)

(*q*) 15 Geo. II. c. 24.

ART. 41.

Where offenders to be committed in towns having a recorder and prison.

Provided also that in all such towns or franchises as have a recorder, and a prison fit for the confinement of prisoners, any justice of the peace for such town or franchise shall commit to the prison of such town all persons charged with having committed within such town or franchise any felony or misdemeanor which might, if the same had been committed out of such town or franchise, and within the body of any county, have been tried by the justices of quarter sessions of such county; and the court of quarter sessions of such town or franchise shall have the same authority to inquire of, hear, determine, and punish any persons charged with such felonies or misdemeanors as the courts of quarter sessions of counties have. (*r*)

(*r*) 4 & 5 Will. IV. c. 27, s. 3, in part.

ART. 42.

Power to commit from liberty to county gaol for capital offences.

Any justice of the peace acting within and for any town, liberty, soke, or place not being a county, but having an exclusive jurisdiction for the trial of felonies and misdemeanors committed within the same, shall have full power, within their respective limits, at his discretion, to commit any person duly charged before him with any capital offence committed within such limits, to the gaol of the county within which such town, liberty, soke, or place shall be situated, there to be tried at the next session of oyer and terminer, or general gaol delivery to be held in and for such county, in the same manner as if such offence had been committed within any other part of such county, and as if such person had been committed by any justice for the same county, not being within such limits. (*s*)

(*s*) 60 Geo. III. & 1 Geo. IV. c. 14, s. 1.

ART. 43.

Justices in boroughs not having power to hear and determine, &c., may commit for trial at county sessions.

Any justice of the peace acting in and for any borough or franchise, not being empowered by charter or otherwise to hear and determine felonies, shall commit every person charged with any such felony as the court of quarter sessions may have jurisdiction to try, to be tried at the general quarter sessions of the peace for the county, riding, or division wherein such borough or franchise shall be situate, or at any adjournment thereof; and the justices of the peace acting for such county, riding, or division, are hereby empowered to try persons so committed at the general

quarter sessions of the peace held for such county, riding, or division, or at any adjournment thereof. (*t*)

(*t*) 4 & 5 Will. IV. c. 27, s. 1.

ART. 44.

Power to commit from boroughs or franchises in respect of offences not triable within such boroughs, &c.

Any justice of the peace acting in any borough or franchise having jurisdiction at the general sessions of the peace held in and for such borough or franchise, to hear and determine certain felonies, shall commit to the gaol of the county, riding, division, or shire in which such borough or franchise may be situate, to be tried at the general quarter sessions of the peace in and for such county, riding, division, or shire, any person charged with a felony which the court of such quarter sessions may have jurisdiction to try, and to the trial of which the jurisdiction of the justices of such borough or franchise at the general sessions of the peace in and for such borough or franchise does not extend; and the justices of the peace acting in and for such last-mentioned county, riding, division, or shire, are hereby authorized and empowered to try any such person so committed as last mentioned, at the general quarter sessions of the peace held in and for such county, riding, division, or shire.(*u*)

(*u*) 4 & 5 Will. IV. c. 27, s. 2.

ART. 45.

No fees payable by prisoners on commitment.

No fee or gratuity shall be payable by any prisoner on his entrance into or commitment to any prison. (*x*)

(*x*) 55 Geo. III. c. 50, s. 1; and see Chap. V. Sec. 2, Art. 9, of the Act of Crimes and Punishments, for the punishment incurred by gaolers who exact any such fee or gratuity.

ART. 46.

Calendar of prisoners.

Every sheriff, bailiff of franchise, and other person having authority to keep any gaol or prisoners for felony, shall certify the names of every such prisoner in his keeping, and of every prisoner to him committed for any such cause, at the next general gaol delivery in every county or franchise where any gaol or gaols shall be, there to be calendared before the justices of the deliverance of the same gaol, whereby they may, as well for the Queen as for the party, proceed to make deliverance of such prisoners according to law. (*y*)

(*y*) 3 Hen. VII. c. 3, in part; the penalty for not complying with the above provisions is five pounds.

ART. 47.

Constable's duty upon notice of persons keeping a bawdy-house, gaming-house, &c.

If any two inhabitants of any parish or place, paying scot and bearing lot therein, shall give notice in writing to any constable (or other peace officer of the like nature, where there is no constable) of such parish or place, of any person keeping a bawdy-house, gaming-house, or any other disorderly house, in such parish or place, the constable or such other officer so receiving such notice, shall forthwith go with such inhabitants to a justice of the peace for the county in which such parish or place shall be, and shall, upon such inhabitants making oath before such justice that they believe the contents of such notice to be true, and entering into a recognizance in the penal sum of 20*l.* each, to give or produce material evidence against such person for such offence, enter into a recognizance in the penal sum of 30*l.* to prosecute with effect such person for such offence at the next general or quarter sessions of the peace, or at the next assizes to be holden for the county in which such parish or place shall be as to such justice shall seem meet; and such constable or other officer shall be allowed all the reasonable expenses of such prosecution, to be ascertained by any two justices of the peace of the county where the offence shall have been committed, and shall be paid the same by the overseers of the poor of such parish or place; and in case such person shall be convicted of such offence, the overseers of the poor of such parish or place shall forthwith pay the sum of 10*l.* to each of such inhabitants, and 10*l.* on conviction to each of the two inhabitants, to be paid by the overseers. (*z*)

The charges of prosecution.

(*z*) 25 Geo. II. c. 36, s. 5. By the same Section it is provided that in case such overseers shall neglect or refuse to pay to such constable or other officer such expenses of the prosecution as above-mentioned, or shall neglect or refuse to pay upon demand such sums of 10*l.* and 10*l.*, such overseers and each of them shall forfeit to the person intitled to the same double the sum so refused or neglected to be paid.

ART. 48.

Persons keeping such bawdy-house, &c. to be bound over.

Provided that upon the constable or other officer entering into such recognizance to prosecute as in the last preceding Article is mentioned, the justice of the peace shall forthwith make out his warrant to bring the person so accused of keeping a bawdy-house, gaming-house, or other disorderly house, before him, and

shall bind him over to appear at such general or quarter sessions or assizes as in that Article specified, there to answer to such bill of indictment as shall be found against him for such offence; and such justice may, if in his discretion he thinks fit, likewise demand and take security for such person's good behaviour in the mean time, and until such indictment shall be found, heard, and determined, or be returned by the grand jury not to be a true bill. (*a*)

(*a*) 25 Geo. II. c. 36, s. 6.

ART. 49.

Highways.

If on the hearing of any summons under the provisions of an Act passed in the Session of Parliament holden in the 5th and 6th years of the reign of King William IV., intituled, "An Act to Consolidate and Amend the Laws relating to Highways in that part of Great Britain called England," respecting the repair of any highway, the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish, or by any other party charged therewith, it shall then be lawful for the justices assembled in special sessions for the highways, and they are hereby required to direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpœnaed at the next assizes to be holden in and for the county, or at the next general quarter sessions of the peace for the county, riding, division, or place wherein such highways shall be, against the inhabitants of the parish, or the party to be named in such order for suffering and permitting such highway to be out of repair. (*b*)

(*b*) 5 & 6 Will. IV. c. 50, s. 95. It does not appear who is to be bound over to prosecute.

SECTION 6.

Search Warrant.

ART. 1.

Search warrant where property has been fraudulently taken, obtained, converted, or received.

IF any credible witness shall prove, upon oath before a justice of the peace, a reasonable cause to suspect that any person has in his possession or on his premises anything which shall have been stolen, embezzled or obtained by any false pretence, or which shall have been unlawfully received, with a knowledge that the same had been so stolen, embezzled or obtained, contrary to any Article of the Act of Crimes and Punishments, (*a*) such justice may grant a warrant (to be executed within the limits of his jurisdiction) to search for such thing. (*b*)

(*a*) The words of the Act are "any property on or with respect to which any offence punishable by "virtue of this Act (7 & 8 Geo. IV. c. 29) shall have been committed."

(*b*) See 7 and 8 Geo. IV. c. 29, s. 63, in part.

ART. 2.

A positive oath that the thing so suspected to be in the possession or on the premises of any person, as in the last preceding Article is mentioned, has been stolen, embezzled, obtained by any false pretence, or unlawfully received as therein is mentioned, is not necessary to justify a justice of the peace in granting a search warrant. (*c*)

(*c*) Elser and Smith, 2 D. & R. 97.

ART. 3.

A search warrant may be granted or issued on a Sunday as well as on any other day. (*d*)

(*d*) 11 & 12 Vict. c. 42, s. 4, in part.

ART. 4.

Form of warrant.

A search warrant must be signed by and under the seal of the justice of the peace issuing the same, and shall be directed to some peace officer or other person, in the same manner as is required by Article 36 of Section 1 of this Chapter, in the case of a warrant of arrest, and shall specify the things which are the object of search by their ordinary names, and shall describe the dwelling-house or other premises where, or by name or other description the person in whose possession, they are suspected to be, and shall order the same, if found, to be seized and carried forthwith before some justice of the peace.

ART. 5.

A search warrant may also direct the arrest, either by name or by description of his person, of the owner of the premises in which anything which is the object of

search shall be found, or of the person who shall have any such thing in his possession, and order him to be taken before some justice of the peace having jurisdiction, and to be further dealt with according to law. (*e*)

(*e*) 2 Hale, 252.

ART. 6.

Mode of execution.

The person to whom the execution of a search warrant pertains may, with his assistants, lawfully enter any dwelling-house or premises mentioned in the warrant on a Sunday as well as on any other day, for the purpose of executing such warrant; but must do so in the day-time only, except where authority is given by the warrant to enter at any time of the day or night; and such persons are justified in making search as directed by the warrant, although the things sought be not found. (*f*)

(*f*) 2 Hale, 151.

ART. 7.

The person to whom the execution of a search warrant pertains may break open the outer door or window of any dwelling-house mentioned in such warrant in order to execute the same, if, after notification of his authority and purpose, and demand of admittance duly made, he cannot otherwise obtain admittance.

ART. 8.

Subsequent proceedings.

If upon examination it appear that the things found were not stolen, embezzled, obtained by any false pretence, or unlawfully received, they are to be restored to the person in whose house or premises, or in whose possession they were found; but if it appear that they were stolen, embezzled, obtained by any false pretence, or unlawfully received, they are to be delivered to the sheriff or some peace officer to the end that the offender may be prosecuted and restitution made. (*g*)

(*g*) 2 Hale, 151.

ART. 9.

If the things found were stolen, embezzled, obtained by any false pretence, or unlawfully received, the person in whose house or premises or in whose possession they were found may, if he appear to have acted innocently in the transaction, be bound over or ordered to appear, in manner in Articles 10 and 13 of Section 5 of this Chapter respectively mentioned, to give evidence against the party from whom he received them, if there be reasonable ground for suspicion against the latter; but in case it appear that the person had them in his possession with a guilty knowledge, he is to be dealt with in the same manner as any person brought before a justice of the peace upon the charge of having committed, or of being suspected to have committed, any crime, may be dealt with under the provisions of that Section.

ART. 10.

Provision for the recovery and seizure of counterfeit coin and coining tools, for securing them as evidence, and for ultimately disposing of the same.

If any person shall find or discover in any place, or in the possession of any person having the same without lawful excuse, any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the current gold, silver or copper coin, (*h*) or any kind of coin not the proper coin of this realm, nor permitted to be current within the same, but resembling or made with intent to resemble or pass for any gold or silver coin of any foreign power or country, (*i*) or any copper coin or other coin made of any metal or mixed metals of less value than the silver coin of any foreign power or country, (*k*) or any instrument, tool or engine adapted and intended for the counterfeiting of any such coin, it shall be lawful for the person so finding or discovering, and he is hereby required to seize the same, and to carry the same forthwith before some justice of the peace; and when it shall be proved on the oath of a credible witness before any justice of the peace that there is reasonable cause to suspect that any person has been concerned in counterfeiting the current gold, silver or copper coin, or any such foreign coin as hereinbefore in this Article is mentioned, or has in his custody or possession any such counterfeit coin, or any such instrument, tool or engine, it shall be lawful for such justice to grant a warrant (*l*) to search any place belonging to or in the occupation or under the control of such suspected person, and if such counterfeit coin, or any such instrument, tool or engine shall be found in any place so searched, to cause the same to be seized and carried forthwith before some justice of the peace; and wherever any such counterfeit coin, or any such instrument, tool or engine, shall in any case be seized and carried before a justice of the peace, he shall cause the same to be secured for the purpose of being produced in evidence

against any person who may be prosecuted for any offence against any of the first 17 Articles of Chapter VII. of the Act of Crimes and Punishments; and all counterfeit coin resembling or apparently intended to resemble or pass for any of the current coin, and all instruments, tools and engines adapted and intended for the counterfeiting of such coin, after they shall have been produced in evidence, or where they shall have been seized and shall not be required to be produced in evidence, shall forthwith be delivered up to the officers of Her Majesty's Mint or to their solicitor or to any person authorized by them or him to receive the same; (*m*) and all such counterfeit foreign coin, instruments, tools and engines, after they shall have been produced in evidence, or where they shall have been seized and shall not be required to be produced in evidence shall, forthwith, by order of the court before which any person who may be prosecuted as hereinbefore in this Article is mentioned shall be tried, or by order of some justice of the peace, in case there shall be no trial, be defaced or destroyed or otherwise disposed of as such court or such justice shall direct. (*n*)

(*h*) 2 Will. IV. c. 34, s. 14.
(*i*) 37 Geo. III. c. 126, s. 7.
(*k*) 43 Geo. III. c. 139, s. 7.
(*l*) By the 2 Will. IV. c. 34, s. 14, the warrant need only be *signed* by the justice granting it; but see Art. 14 of this Section.
(*m*) 2 Will. IV. c. 34, s. 14.
(*n*) 37 Geo. III. c. 126, s. 7; 43 Geo. III. c. 139, s. 7. This Article is compounded of the 37 Geo. III. c. 126, s. 7; the 43 Geo. III. c. 139, s. 7; and the 2 Will. IV. c. 34, s. 14; but the language is generally that of the 2 Will. IV. c. 34, s. 14, as being the most recent enactment. The first branch of the above Article, viz., that empowering a person discovering counterfeiting coin to seize and take it before a justice of the peace, is peculiar to the 2 Will. IV. c. 34; but, as there appears to be no reason against extending it to the case of counterfeit foreign coin, we have made it generally applicable.

Art. 11.

Any of the Commissioners for executing the office of Lord High Admiral of Great Britain and Ireland for the time being, or any such Superintendent as is mentioned in Article 27 of Section 1 of Chapter I. of this Act, or any Commissioner of the Ordnance for the time being (*o*) (who for the purposes hereinafter in this Article mentioned, as well as for those in Article 8 of Section 2 of this Chapter, is hereby authorized to act in every respect as if he were a justice of the peace for the county in which he shall be resident, or into which his warrant shall issue), or any justice of the peace for any county, upon the oath of any credible witness that there is reasonable cause to suspect that any Navy, Ordnance, Victualling or other public stores or goods belonging to Her Majesty, are concealed in any dwelling-house, warehouse, workshop, outhouse, yard, garden or other place, or on board any ship, vessel, barge, boat or other craft, may grant a warrant authorizing any peace officer, either of the county in which the premises, ship or other craft shall be, or in which the Commissioner or Superintendent granting such warrant (if granted by a Commissioner or Superintendent) shall then reside, to search such dwelling-house or other place, ship or other craft, in whatsoever county the same or any of them shall be (in case such warrant shall be granted by any such Commissioner or Superintendent). (*p*)

(*o*) See note (*n*) to Article 8 of Section 2, ante.
(*p*) 39 & 40 Geo. III. c. 89, s. 11, in part; 55 Geo. III. c. 127, s. 2; 2 Will. IV. c. 40, ss. 5 and 11. The search warrant authorized to be granted by the 39 & 40 Geo. III. c. 39, s. 11, is to be executed in the day-time only; but see Art. 14 of this Section.

Art. 12.

Search warrant for illegal gold and silver ware.

Whensoever the Company of Goldsmiths in London, or any of the several companies of Goldsmiths in the cities of York, Exeter, Bristol, Chester, or Norwich, or of the town of Newcastle-upon-Tyne, or either of the companies of guardians of the standard of wrought plate in the towns of Sheffield or Birmingham, shall have reasonable cause to suspect that any dealer in gold or silver wares has concealed or deposited in any house, shop or place, or has possession of any wares of gold or silver which ought to be marked with any of the marks which shall have been provided or used by any of such companies respectively for marking or stamping gold or silver wares and not so marked, or has so concealed or deposited or has possession of any forged die or other instrument which shall have been so provided or used, or any ware of gold or silver, or ware of base metal, having thereupon any mark of any such forged die or other instrument, or having thereupon any forged mark of any die or other instrument which shall have been so provided or used, or any mark which shall have been transposed or removed

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thereto from any other ware of gold or silver, it shall be lawful for any justice of the peace having jurisdiction where any of such offences shall be suspected to be committed, and such justice is hereby required, upon information or complaint made of any such reasonable cause of suspicion, by or on behalf of any of such several companies, and upon the oath of any credible witness, to grant a warrant, directed to any one or more of the officers of any of such several companies, together with any peace officer named in such warrant, authorizing such officer of such companies respectively, and such peace officer, with necessary and proper assistance to enter any such house, shop or place, or any other house, shop or place of any such suspected person, and to search the same, and to seize and take away every such forged die or other instrument, and every such before-mentioned ware which shall there be found; and all such peace officers are hereby required to be aiding and assisting in the execution of every such warrant; and every such forged die or other instrument, and every such ware so there found, seized and taken, shall be dealt with as hereinafter in the next succeeding Article is provided: Provided that nothing in this Article contained shall authorize the search for or seizure of any wares which by the laws now in force are not required to be marked or stamped by any of such companies, or any of the wares following, namely, watch-rings, watch-keys, watch-hooks, earrings, necklaces, eye-glasses, spectacles of gold, shirt-pins or studs, bracelets, head-ornaments, waist-buckles. (*q*)

(*q*) 7 & 8 Vict. c. 22, s. 11. The search warrant authorized by the 7 & 8 Vict. c. 22, s. 11, embodied in the above Article need only be *signed* by the justice granting it, and is to be executed in the day-time only; but see Article 14 of this Section.

ART. 13.

False dies and wares seized, how to be disposed of.

Every die, punch, or other instrument which shall be lawfully seized or taken under the last preceding Article by any of the several companies therein mentioned, or by any officer of such companies respectively, shall be broken, detained, and destroyed by such company; and every such ware so seized or taken, if it shall be shown to the satisfaction of the court or justice before whom proceedings shall be had in respect of such ware, that the same has been lawfully seized and taken under the provisions of such last preceding Article, shall be broken and defaced; and in case it shall be shown to the satisfaction of such court or justice that the dealer from whom the same shall have been so seized or taken had such ware in his possession, knowing the same to be marked with a forged die or other instrument, or knowing the mark thereupon to be forged, imitated, transferred or removed, then and in every such case, every such ware so broken and defaced shall be melted, and the metal thereof shall be sold and disposed of, and the produce thereof shall be entered in the book of account of receipts and payments relating to the assay-office belonging to the company by whom or by whose officer such ware shall have been so seized or taken, and shall be applied towards defraying the general expenses of the assay-office of such company, and in the prosecution of offenders under an Act passed in the session of Parliament holden in the 7th and 8th years of the reign of Her present Majesty, intituled "An Act to amend the Laws now in "force for preventing Frauds and Abuses in the marking of Gold and Silver "Wares in England:" and except as hereinbefore in this Article is mentioned, and as is provided in certain other cases specified in that Act, (*r*) every such ware so seized and taken, or broken and defaced, shall be given back to the dealer from whom it shall have been so seized and taken. (*s*)

(*r*) The cases so specified are where seizures have been made of illegal wares; but the having possession of them is not an indictable offence, but subjects the offender to a pecuniary penalty only, recoverable by action of debt, &c.

(*s*) 7 and 8 Vict. c. 22, s. 12, in part.

ART. 14.

The several rules contained in Articles 3, 4, 5, 6, and 7 of this Section, shall (so far as they are applicable) apply to the search warrants mentioned in Articles 10, 11, and 12 of this Section. (*t*)

(*t*) The above Article will make the law uniform as regards the signing and sealing of search warrants, making the latter requisite in all cases; but it may be questioned whether the signature of the justice should not be sufficient. The law is also made uniform by the above Article with respect to the time at which search warrants may be executed. It appears to us to be expedient to allow of their execution in the night-time, where thought necessary by the justice granting them.

CHAPTER II.

Indictment and Criminal Information.

SECTION 1.

Of Finding the Indictment.

Art. 1.

Definition.

An indictment is an accusation at the suit of the Crown, presented by a grand jury, duly constituted and sworn, charging one or more person or persons with the commission of some offence against the Act of Crimes and Punishments, or of several such offences. (*a*)

(*a*) Hawk. P. C. b. 2, c. 25, s. 1. The utility of grand juries has usually been rested on the position, that it is an impediment to frivolous or malicious accusations. In ordinary practice it can seldom have this effect until the accused has undergone every hardship preliminary to taking his trial. And as the investigation is taken in his absence, and, therefore, the witnesses for the prosecution cannot be properly cross-examined nor exculpatory defences suggested, as the judge is not present to superintend the legality of the evidence, and as the witnesses do not speak under the salutary impression of the presence of the public, nor, indeed, under any apprehension of the penalties of perjury, the impediment of a grand jury to frivolous or malicious accusations is very slender indeed. On the other hand, the dismissal of an accusation by a secret and irresponsible tribunal can contribute very imperfectly to allay suspicions of guilt, or to satisfy the public mind that justice has been allowed to flow in its legitimate course. Added to which, the inconveniences and expense incurred by jurymen, prosecutors, and witnesses, the delay of judicial proceedings, and that scandal to the English law of criminal procedure, the flaws detected in indictments, arising out of the defective means of judicial investigation possessed by grand juries, all make it obvious that any advantages derivable from the institution of grand juries are not without a great alloy of very serious mischiefs. If it be thought that in some cases it is important to shield an accused with the double protection of a grand and petit jury, it is conceived that, at all events, a grand jury may be safely dispensed with in all cases of commitments by stipendiary magistrates, being barristers-at-law, for all offences other than those contained in the Chapter of the Act of Crimes and Punishments, which relates to treason and other offences against the State.

We have, however, abstained from making any organic change in the institution of grand juries, as deeming the subject of such constitutional importance as to be more fit for the determination of the Legislature even in the first instance.

We beg to refer to the evidence on the subject of grand juries contained in the Appendix to the Eighth Report of the Criminal Law Commissioners.

Art. 2.

Grand jury.

A grand jury consists of 12 men at the least, and not more than 23, (*b*) being inhabitants of the county or other district for which they serve, duly returned before some court having jurisdiction to try parties for crimes by means of a jury, and sworn to make presentment of offences committed within the limits of such county or district respectively.

(*b*) Although a greater number be returned.

Art. 3.

A grand jury is summoned by virtue of a precept which in the Queen's Bench is tested by the chief justice, or, during vacancy, by the senior judge; under all commissions of oyer and terminer or gaol delivery, by the senior judge under the commission; and in courts of sessions of the peace by any two justices of the peace.

Art. 4.

Provided that in boroughs having separate courts of sessions of the peace, the clerk of the peace of every such borough shall, seven days before the holding of any quarter sessions of the peace, cause to be summoned a sufficient number of persons qualified and liable to serve as grand jurors at any such sessions. (*c*)

(*c*) 5 & 6 Will. IV. c. 76, s. 121, in part.

Art. 5.

The precept mentioned in Article 3 of this Section is directed to the sheriff or other officer having authority to act in that capacity for the county or other district, for which inquiry is to be made, commanding such sheriff, or other officer, in Her Majesty's name, to summon and return the names of a sufficient number of persons qualified and liable to serve as grand jurors for such county or other district.

Art. 6.

Qualification.

Provisions descriptive of the persons who are qualified and liable to serve, of those who are disqualified to serve, and of those who are exempt from serving on, and other regulations relating to grand juries (*d*) are contained in an Act passed

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in the sixth year of the reign of King George IV., intituled "An Act for Consolidating and Amending the Laws relative to Jurors and Juries;" an Act passed in the session of Parliament holden in the fifth and sixth years of the reign of King William IV., intituled "An Act to provide for the regulation of Municipial Corporations in England and Wales;" and an Act passed in the session of Parliament holden in the second and third years of Her present Majesty's reign, intituled "An Act for regulating the Police Courts in the Metropolis," respectively. (*e*)

(*d*) The law does not at present specify any general qualification in point of property as essential to the office of a grand juror. The Jury Act, 6 Geo. IV. c. 50, provides only in respect of such as serve at sessions of the peace, but requires only the same amount of qualification as is required in the case of a petty juror. The natural inference is, that the legislature interfered in those cases only where there might be some difficulty in otherwise securing the services of persons of adequate consideration in respect of property to act as grand jurors in the inferior courts, there being no necessity for interfering to fix a minimum of qualification for grand jurors in the higher courts.

(*e*) 5 & 6 Will. IV. c. 76; 2 & 3 Vic. c. 71, s. 4. See the 22 Geo. III. c. 83, s. 10, which exempts the visitors, &c., of houses of industry established by parishes incorporated under that Act; it may be doubtful whether that enactment be now applicable, since the passing of the 4 & 5 Will. IV. c. 76; if it be, we think it desirable that it should be repealed.

ART. 7.

Also all persons engaged in the Post Office are exempted from serving on grand juries. (*f*)

(*f*) *Ex-parte* Atkinson, 10 Bing. 399.

ART. 8.

Who bound to serve on grand juries.

All persons duly summoned to serve on any grand jury are bound so to serve, if they are reasonably able, unless they can show that they are exempted or disqualified by law from so doing. (*g*)

(*g*) 2 Hale's, P. C. 309; Chitty's Burn's Justice "Jurors." By the 6 Geo. IV. c. 50, s. 38, if any man having been duly summoned to attend on any kind of jury in any of the courts of England and Wales thereinbefore mentioned, shall not attend in pursuance of such summons, or being thrice called shall not answer to his name, or being called shall be present but not appear, or after his appearance shall wilfully withdraw himself from the presence of the court, the court shall set such fine on every such man so making such default (unless some reasonable excuse shall be proved by oath or affidavit) as the court shall think meet.

ART. 9.

Matter of exemption or disqualification is not available to a party duly summoned, and reasonably able to attend the court unless he attend and show such matter to be true. (*h*)

(*h*) 2 Inst. 448; Tri. per Pais, 87; Hawk. P. C. b. 2, c. 25, s. 20; Chitty's Burn's Justice, "Jurors 1."

ART. 10.

Second grand jury during the same assizes, &c.

It is competent to the court during the term, session of oyer and terminer, general gaol delivery, or of the peace, to direct a fresh grand jury to be returned and sworn. (*i*)

(*i*) 2 Hale, 156; 1 Chitty's C. L. 314.

ART. 11.

Where a fresh grand jury thus summoned inquires of an offence committed during the term or such session as in the last preceding Article is mentioned, a special record of the adjournment of such session to the day on which such grand jury so inquires is to be made. (*k*)

(*k*) Otherwise the inquiry would appear to have taken place before the offence had been committed, which would be erroneous. Sir W. Jones, 420; 1 Barnard. 328; 2 Hale, 24, 156; 1 Chitty's C. L., 315.

ART. 12.

Time of objecting to qualification of grand jurors.

The accused may, either in the first instance, and before the grand jury have found the bill, object to any of the parties whose names are returned to serve as grand jurors, on account of his being disqualified to act, (*l*) or may, after the grand jurors have found the bill, at any time before the petit jury are sworn, but not afterwards allege such matter in avoidance of the finding. (*m*)

(*l*) Hawk. P. C. b. 2, c. 25, s. 16; 2 Hale's P. C. 155; Talf. Dick. quarter sessions, p. 153.

(*m*) This has been doubted in practice, and the doubt ought to be removed by an express rule. It seems to us to be just and expedient that such an objection should be limited to a time previous to the trial. See 1 Chitt. C. L. 308; Cro. Car. 134, 5; Haw. P. C. b. 2. c. 25, s. 16; 11 H. 4, c. 9; Bac, Ab. "Juries." It is doubtful whether the party can object afterwards unless the objection be verified by the records of the court in which the indictment is pending. 3 Inst. 34; Haw. P. C. b. 2, c. 25, s. 27, Bac. Ab. "Juries A."

ART. 13.

Oath.

The persons composing a grand jury shall, before entering upon the duties of their office, appoint one of their body to act as their foreman, which having been done, the proper officer of the court shall swear the grand jury in the following manner, that is to say, he shall administer to their foreman the following oath, viz.:—

"You as foreman of this inquest shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge. The Queen's council, your fellows, and your own, you shall keep secret. You shall present no man for envy, hatred, or malice; neither shall you leave any man unpresented for fear, favour, or affection, or hope of reward; but you shall present all things truly as they come to your knowledge, according to the best of your understanding."

"So help you God."

And afterwards to the rest of the grand jury, either separately or by any number not exceeding three at a time, he shall administer the following oath, viz.:—

"The same oath which your foreman hath taken on his part, you and every of you, shall well and truly observe and keep on your parts."

"So help you God." (*n*)

(*n*) See Talf. Dick. quarter sessions, 154.

ART. 14.

Presentments by grand juries.

After being duly sworn, the grand jurors retire to receive evidence, and otherwise proceed in order to the due making of their presentments as hereinafter in this Section mentioned.

ART. 15.

Such presentments consist either of indictments found by such grand jurors on bills of indictment preferred by persons who prosecute for the Crown, or of indictments framed upon such grand jurors' inquiry or of their own knowledge of any offence or offences. (*o*)

(*o*) Hawk. P. C. b. 2, c. 25, s. 1; 4 Black. Comm. 301.

ART. 16.

Asserting that the Houses of Parliament have a legislative authority without the Crown.

Provided that no person can be prosecuted for any offence contained in Article 11 of Section 3 of Chapter II. of the Act of Crimes and Punishments, unless by order of the Queen, directed to the Attorney-General under the sign manual, or by order of the Council Table of Her Majesty, directed to the Attorney-General. (*p*)

(*p*) 13 Car. II. c. 1, s. 4, in part.

ART. 17.

Customs or Excise.

Provided also that no bill of indictment shall be preferred under any Article of the Act of Crimes and Punishments, relating to the Customs or Excise, unless such bill of indictment shall be preferred under the direction of the Commissioners of Her Majesty's Customs or Excise. (*q*)

(*q*) 8 & 9 Vic. c. 87, s. 126, in part. Qy. If the exception contained in the Act, viz.: "Except in the cases of persons detained and carried before one or more justices in pursuance of this Act," be intended to apply to indictments or only to suits for the recovery of penalties. See the Act. It will not be necessary, if our suggestion (see Article 9 of Section 2 of this Chapter) that the indictment should follow the language of the Article of the Act of Crimes and Punishments upon which it is founded, be adopted, to state in the indictment that it is preferred under the direction of the Commissioners; but it is provided by the 8 and 9 Vic. c. 87, s. 130, that *if that fact be averred*, it shall be sufficient without proof of it unless the defendant shall prove the contrary.

ART. 18.

Prosecution against Bankrupt, for any offence against the Act of Crimes and Punishments, may be ordered by the Court acting in Prosecution of the Fiat.

Provided also that the Court authorized to act in the prosecution of any fiat in bankruptcy may, upon the request in writing of at least three creditors (not being partners), who shall have respectively proved debts to the amount of fifty pounds or upwards under such fiat, direct the assignees of the bankrupt named in such fiat, if he shall be suspected of or charged with the commission of any of the offences specified in any of Articles 1, 2, and 4 of Section 1 of Chapter XIV. of the Act of Crimes and Punishments, to institute and carry on a prosecution of such bankrupt for such offence, and such assignees shall thereupon institute and carry on such prosecution; and in case such assignees shall refuse or neglect to institute and carry on to conviction such prosecution, having no lawful or reasonable impediment made known to and allowed by such Court, such Court may order the same to be

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instituted and carried on either by the official assignee alone, or by the creditors making such request, as such Court may think fit. (*r*)

(*r*) 5 and 6 Vic. c. 122, s. 36, in part.

ART. 19.

Extent of authority.

A grand jury has no authority, unless in the cases hereinafter in this Section specially mentioned, to inquire of any offence which has not been committed within the limits of the county or district for which they serve.

ART. 20.

Provided that nothing in the last preceding Article contained shall be deemed to exclude a grand jury from inquiring concerning collateral facts in places beyond the county or other district for which they inquire, and which tend to the proof of an offence within their jurisdiction. (*s*)

(*s*) As in the case where goods taken by robbery in another county are brought by the offender into the county for which the jury act. The common law rule does not extend to thefts done beyond the realm of England, where the law took no cognizance of the original taking, 3 Inst. 103; 13 Co. 53.

ART. 21.

Where, in any of the cases specified in Articles 8, 12, 13, 14, 15, 17, 18, 19, and 20, of Section 1 of Chapter I. of this Act, a justice of the peace for any county, riding, division, liberty, city, borough, or place, has authority to issue his warrant to apprehend any person, the grand jury for any such county, riding, division, liberty, city, borough, or place, may inquire of the offence with which such person is charged, although it shall have been committed either wholly or in part, as in any such Article is mentioned, out of the limits of such county, riding, division, liberty, city, borough, or place.

ART. 22.

The following offences may also be inquired of by grand juries for the counties hereinafter mentioned respectively, in the same manner as if such offences had been committed in such counties respectively, that is to say :—

Treason and Misprision of Treason committed abroad.

1. Treason and misprision of treason committed out of the United Kingdom (*t*) may be inquired of by a grand jury for the county in which the Court of Queen's Bench shall for the time being sit, or by a grand jury for any county in which Commissioners shall be assigned by Her Majesty to inquire of and determine such offences. (*u*)

(*t*) The words of the 35 Hen. VIII. c. 2, s. 1, are "out of this realm of England;" but Scotland, Ireland, and Wales, have been held not to be out of the realm within the meaning of those words. The Isles of Man, Guersey, Jersey, Sark, and Alderney, and the Foreign Plantations, however, are to be deemed to be out of the realm. See Steph. C. L. 257.

(*u*) 35 Hen. VIII. c. 2, s. 1. See also 26 Hen. VIII. c. 13, s. 4, and 5 & 6 Edw. VI. c. 11, ss. 6, 7, and 8.

Stealing from ships in distress.

2. Any offence against Article 75 of Section 1 of Chapter XVIII. of the Act of Crimes and Punishments may be inquired of in the county next adjoining that in which it shall have been committed. (*v*)

(*v*) 7 & 8 Geo. IV. c. 29, s. 18, in part.

Offenders escaping, breaking prison, or being rescued.

3. The offence of escaping, breaking prison, or being rescued in such manner as in any Article of Chapter V. of the Act of Crimes and Punishments is mentioned, may be inquired of in any county in which the offender shall be apprehended and retaken. (*x*)

(*x*) See 56 Geo. III. c. 63, s. 45; 59 Geo. III. c. 136, s. 20; 4 Geo. IV. c. 64, s. 44; 1 & 2 Vic. c. 82, s. 14; 5 & 6 Vic. c. 29, s. 28.

Escape by prisoner under sentence of transportation or banishment.

4. The offence of being at large contrary to the provisions of Article 6 of Section 5 of Chapter V. of the Act of Crimes and Punishments may be inquired of either in the county or place in which the offender shall be apprehended, or in that from which he was ordered to be transported or banished. (*y*)

(*y*) 5 Geo. IV. c. 84, s. 22, in part.

Offences relating to the post-office, bigamy, and forgery.

5. Any offence against any Article of the Act of Crimes and Punishments relating to the post office, (*z*) or against Article 1 of Chapter IX. of that Act, (*a*) and any offence of forging any written instrument or thing, or of offering, uttering, publishing, disposing of or putting off any such instrument or thing, knowing the same to be forged, may be inquired of in any

county or place in which the offender shall be apprehended or be in custody. (*b*)

(*z*) 7 Will. IV. and 1 Vic. c. 36, s. 37.
(*a*) 9 Geo. IV. c. 31, s. 22, in part.
(*b*) 11 Geo. IV. and 1 Will. IV. c. 66, s. 24. The Statute also provides for the trial of an accessory before the fact; this is already provided for generally.

Inciting to mutiny; assisting on the high seas prisoners of war to escape; administering, &c., oaths for any seditious purpose, or binding persons to commit any capital offence; forging Mediterranean passes; and offences relating to the Excise.

6. Any offence against Article 1 of Section 7, (*c*) Article 3 of Section 8, (*d*) or Article 1 of Section 11 (*e*) of Chapter II. of the Act of Crimes and Punishments, or against Article 22 or Article 23 (*f*) of Chapter VI. of that Act, and any offence against Section 7 (*g*) of Chapter XIV. of that Act, where such offence shall be committed out of Great Britain, and any offence against any Article of that Act relating to the Excise, (*h*) when such offence shall be committed in England, may be inquired of in any county in England.

(*c*) 37 Geo. III. c. 70, s. 2; 57 Geo. III. c. 7.
(*d*) 52 Geo. III. c. 156, s. 3, in part.
(*e*) 37 Geo. III. c. 123, s. 6.
(*f*) 52 Geo. III. c. 104, s. 7, in part.
(*g*) 4 Geo. II. c. 18, s. 2.
(*h*) See 7 & 8 Geo. IV. c. 53, s. 43. We have made the provision generally applicable.

Embezzlement by public officers; and offences relating to the duties under the management of the Commissioners of Stamps and Taxes.

7. Any offence against Article 1 of Section 1 of Chapter VIII. (*i*) of the Act of Crimes and Punishments, or against any Article of that Act relating to any stamp duty may be inquired of in the county or place in which the offender shall be apprehended. (*j*)

(*i*) 2 Will. IV. c. 4, s. 5.
(*j*) 53 Geo. III. c. 108, s. 25. This Act only relates to offences against Stamp Acts then in force.

Offences relating to the Customs.

8. Any offence against any Article of the Act of Crimes and Punishments relating to the Customs committed upon the high seas may be inquired of either in the city, borough, liberty, division, franchise, or town corporate into which the offender shall be taken, brought, or carried, or in which he shall be found, or in the county within which such city, borough, liberty, division, franchise, or town corporate, is situated; and any offence against any Article of that Act relating to the Customs committed in England may be inquired of in any county in England, (*k*) or where committed in any city, borough, liberty, division, franchise, or town corporate, in such city, borough, liberty, division, franchise, or town corporate [or in the county within which any such city, borough, liberty, division, franchise, or town corporate is situated]: (*l*) Provided that where any offence shall be committed in any place upon the water not being within any county, or where any doubt exists as to the same being within any county, such offence shall, for the purposes of this Article, be deemed to be an offence committed upon the high seas. (*m*)

(*k*) 8 & 9 Vic. c. 87, s. 136.
(*l*) Qy. as to omitting the words between brackets: by sec. 136 of 8 and 9 Vic., c. 87, indictments for offences committed in England generally may be inquired of in any county in England. That branch of the above Article appears, therefore, to render this unnecessary; but see the Act.
(*m*) 8 & 9 Vic. c. 87, ss. 95, 96.

Destroying, &c., ships of war, royal arsenals, dockyards, military, naval, or victualling stores, &c.

9. Any offence against Article 1 of Section 2 of Chapter VIII. of the Act of Crimes and Punishments where such offence shall be committed in any place out of this realm may be inquired of in any county in England, or in such island, country, or place where such offence shall have been committed, as Her Majesty may deem most expedient for bringing the offender to justice. (*n*)

(*n*) 12 Geo. III. c. 24. s. 2.

Offences relating to the Slave Trade.

10. Any offence against any Article of Chapter XIX. of the Act of Crimes and Punishments relating to the Slave Trade may be inquired of in the county of Middlesex. (*o*)

(*o*) 5 Geo. IV. c. 113, s. 50.

Making false declarations relative to liabilities to assessed taxes.

11. Any offence against Article 1 of Section 5 of Chapter VIII. of the Act of Crimes and Punishments, whether the declaration therein mentioned shall be made within Great Britain or without, shall be inquired of in the county, riding, or shire where such declaration shall be exhibited to the

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respective Commissioners of the duties to which such declaration shall relate. (*p*)

(*p*) 50 Geo. III. c. 105, s. 10.

Aiding escape of convicts from New South Wales or Van Diemen's Land.

12. Any offence against Article 14 of Section 5 of Chapter V. of the Act of Crimes and Punishments may be inquired of by the Court of Queen's Bench at Westminster. (*q*)

(*q*) 9 Geo. IV. c. 83, s. 34, in part.

Masters of ships forcing on shore or leaving behind any person belonging to their crew.

13. Any offence against any Article of Section 8 of Chapter XIV. of the Act of Crimes and Punishments may be inquired of in any county or place in which the offender shall happen to be. (*r*)

(*r*) 7 & 8 Vic. c. 112, s. 47, in part.

Concealing, secreting, &c., anchors, &c., left by ships in harbours, &c.

14. Any offence against any of Articles 3, 4, and 5 of Section 7 of Chapter XVIII. of the Act of Crimes and Punishments may be inquired of in any county or city (being a county) in which anything in relation to which any such offence shall have been committed shall have been found in the possession of the person committing the offence; or if the same shall have been sold in foreign parts, then in the county or place in which the person selling the same shall reside. (*s*)

(*s*) 1 & 2 Geo. IV. c. 75, s. 22.

Homicide, &c., committed on land out of the United Kingdom.

15. Any offence against any Article of Sections 2, 3, and 4 of Chapter XV. of the Act of Crimes and Punishments, or any offence of preventing or endeavouring to prevent the arrest of any person liable to apprehension in respect of any offence against any such Article by him committed, or by virtue of any warrant to arrest him for any such offence, or upon any charge or suspicion of any such offence, or by reason of any indictment found against him for any such offence or of any conviction or outlawry for any such offence, or any offence of facilitating or endeavouring to facilitate the escape from justice of any such person, the same being committed on land out of the United Kingdom, whether within the Queen's dominions or without, may be inquired of in any county or place into which, under the provisions of an Act passed in the 9th year of the reign of King George IV., intituled "An Act for Consolidating and Amending the Statutes in "England relative to Offences against Persons," a commission of oyer and terminer shall be directed for the speedy trial of the offender. (*t*)

(*t*) See 9 Geo. IV. c. 31, s. 7, in part.

Foreign enlistment.

16. Any offence against any Article of Section 9 of Chapter II. of the Act of Crimes and Punishments, whether committed in England or out of the United Kingdom, may be inquired of in the Court of Queen's Bench at Westminster. (*u*)

(*u*) 59 Geo. III. c. 69, s. 4, in part, and 9.

Preventing the arrest of offenders or facilitating their escape from justice.

17. Any offence of preventing or endeavouring to prevent the arrest of any person liable to apprehension in respect of any crime by him committed or by virtue of any warrant to arrest him for any crime or upon any charge or suspicion of any crime or by reason of any indictment found, or information filed against him, or of any conviction or outlawry for any crime, or of facilitating or endeavouring to facilitate his escape from justice, may be inquired of by any court which shall have jurisdiction to try the person so charged, in the same manner as if such first-mentioned offence had been committed at the place where the principal crime was committed, although such first-mentioned offence may have been committed either on the high seas or at any place on land, whether within Her Majesty's dominions or without; and in case the principal crime shall have been committed within the body of any county, and such first-mentioned offence shall have been committed within the body of any other county, such first-mentioned offence may be inquired of in either of such counties. (*v*)

(*v*) See the 7 Geo. IV. c. 64, s. 10; and 11 and 12 Vic. c. 46, s. 2. The offence of being an accessory after the fact is abolished as such by the Act of Crimes and Punishments and a substantive offence against the administration of justice, defined as above, substituted for it.

ART. 23.

Bill of indictment for offences com-

Any prosecutor may prefer his bill of indictment for any offence committed or charged to be committed within the county of any city or town corporate, to the

grand jury for the county next adjoining to the county of such city or town corporate, sworn and charged to inquire for the Queen for the body of such adjoining county, at any sessions of oyer and terminer or general gaol delivery; and every such bill of indictment found to be a true bill by such jury shall be valid and effectual in law as if the same had been found to be a true bill by any grand jury sworn and charged to inquire for the Queen for the body of the county of such city or town corporate. (*x*)

mitted within the county of any city or town corporate, may be preferred to the jury of the county next adjoining.

(*x*) 38 Geo. III. c. 52, s. 2.

ART. 24.

For the purpose of the rule contained in the last preceding Article, the counties of the cities and towns corporate named in the first column of Schedule C annexed to an Act passed in the session of Parliament holden in the 5th and 6th years of the reign of King William IV., intituled "An Act to provide for the "Regulation of Municipal Corporations in England and Wales," shall be considered as next adjoining to the county named in conjunction with the same respectively in the second column of such Schedule; and the town of Berwick shall be taken to be a county of a town corporate, and to be within the provisions of that Article. (*y*)

(*y*) 5 & 6 Will. IV. c. 76, s. 109, in part; see also 38 Geo. III. c. 52, s. 9.

ART. 25.

Provided that nothing in Article 23 of this Section contained shall extend to the cities of London and Westminster, or the borough of Southwark. (*z*)

(*z*) 38 Geo. III. c. 52, s. 10; 5 & 6 Will. IV. c. 76, s. 109, in part.

ART. 26.

Provided also that nothing in Article 23 of this Section contained shall extend to enable any person to prefer any bill of indictment for any offence committed, or charged to be committed, within the county of any city or town corporate, to the jury of such next adjoining county as therein is mentioned, except the person preferring such bill, shall enter into a recognizance before the court where such bill shall be preferred, in the sum of 40*l.*, conditioned to pay the extra costs attending the prosecution for such offence, in such next adjoining county, provided the court before whom the trial is had shall be of opinion that he ought to pay the same. (*a*)

(*a*) 38 Geo. III. c. 52, s. 12, in part.

ART. 27.

Provided also that until Her Majesty shall direct a commission of oyer and and terminer and gaol delivery to be executed with any county of a city or town corporate, all bills of indictment for offences committed within such county of a city or town corporate shall be preferred as in Article 23 of this Section is authorized to be done. (*b*)

(*b*) 5 & 6 Will. IV. c. 76, s. 109, in part.

ART. 28.

Every person before whom any recognizance for the prosecution of any person for any such offence as in Article 23 of this Section is mentioned shall be entered into, or by whom any examination or deposition shall be taken, touching any such offence, shall return the same to the next court of oyer and terminer or general gaol delivery for such next adjoining county as in that Article is mentioned, upon the prosecutor leaving at the dwelling-house or other place of abode of such person, 10 days before the holding of any sessions of oyer and terminer or general gaol delivery for such next adjoining or other county, notice in writing of such prosecutor's intention to prosecute an indictment for such offence, at such sessions of oyer and terminer or general gaol delivery; and after the delivery of any such notice it shall not be lawful for any person to prefer any bill of indictment for any offence mentioned in any such recognizance, at or to any sessions of oyer and terminer or general gaol delivery for the county of such city or town corporate. (*c*)

(*c*) 38 Geo. III. c. 52, s. 7.

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ART. 29.

Treason.

Treason may be inquired of in any county or district in which any overt act of such treason shall be committed. (*cc*)

(*cc*) The stat. 1 P & M. c. 10, s. 7, enacts that all trials for treason shall be had and used only according to the due order and course of the common laws of the realm; but it is shown by Mr. East, in his Pleas of the Crown (see vol 1, p. 103, &c.), that it is enough if one overt act be proved in the county in which the indictment is found.

ART. 30.

Conspiracy.

Conspiracy may be inquired of in any county or district in which any overt act in pursuance of such conspiracy shall be committed.

ART. 31.

Offences in respect of which grand juries have no authority to inquire, unless prosecution commenced within a certain time.
Riot Act and riots by keelsmen.
Marriage Acts.
Unlawful meetings for training to use of arms.
Asserting that Parliament has a legislative authority without the Crown.
Affirming that any person is entitled to the Crown, contrary to the Act of Settlement.
Tumultuous petitioning.
Game Laws.
Offences relating to the Prayer Book.

No grand jury has authority to inquire of any of the following offences unless the prosecutions for the same shall be commenced within the periods hereinafter in this Article respectively mentioned, that is to say, no grand jury has authority to inquire of any offence contained in Articles 13, 15, and 16 of Chapter VI., and Article 9 of Section 5 of Chapter XIV. of the Act of Crimes and Punishments, unless the prosecution be commenced within twelve months after the offence committed; (*d*) or of any offence contained in Articles 4, 5, 6, 7, and 8 of Chapter IX. of that Act, unless the prosecution be commenced within the space of three years after the offence committed; (*e*) or of any offence contained in Section 10 of Chapter II. of that Act, unless the prosecution be commenced within six calendar months after the offence committed; (*f*) or of any offence contained in Article 11 of Section 3 of such last-mentioned Chapter, unless the prosecution take place within six months after the offence committed, and the indictment thereupon be within three months after such prosecution; (*g*) or of any offence contained in Article 12 of such last-mentioned Section, unless the words spoken be given upon oath to one or more justice or justices of the peace within three days after such words spoken, and the prosecution of such offence be within three months after such information; (*h*) or of any offence contained in Section 6 of such last-mentioned Chapter, unless the prosecution be commenced within six months after the offence committed; (*i*) or of any offence contained in Article 46 of Section 7 of Chapter XV. of the Act of Crimes and Punishments, or in Articles 61 and 62 of Section 1 of Chapter XVIII. of that Act, unless the prosecution be commenced within 12 calendar months after the offence committed; (*j*) or of any offence contained in Articles 2 and 4 of Section 2 of Chapter III. of that Act, unless the offender be thereof indicted at the next general sessions to be holden before justices of oyer and terminer, or justices of assize, next after such offence committed. (*k*)

(*d*) 1 Geo. I. st. 2, c. 5, s. 8. 33 Geo. III. c. 67, s. 8. The latter enactment has it 12 calendar months, but we submit that the time should be uniform.

(*e*) 4 Geo. IV. c. 76, s. 21; 6 & 7 Wm. IV. c. 85, s. 41; 3 & 4 Vic. c. 72, s. 4. By the last provision no prosecution is to take place after the expiration of 18 calendar months from the solemnization of the marriage. We have extended the period to make it uniform with that within which prosecutions for other offences against the Law of Marriage may be commenced.

(*f*) 60 Geo. III. & 1 Geo. IV. c. 1, s. 7.

(*g*) 13 Car. II. c. 1, s. 4, in part.

(*h*) 6 Ann. c. 7, s. 3.

(*i*) 13 Car. II. c. 5, s. 2.

(*j*) 9 Geo. IV. c. 69, s. 4, in part. The provisions of the 9 Geo. IV. c. 69, are now extended to the cases provided for by the 7 and 8 Vict. c. 29.

(*k*) 1 Eliz c. 2, s. 20; see also the 1 Edw. VI. c. 1, s. 5, as to the time within which the offence of reviling the sacrament must be prosecuted.

ART. 32.

The laying of an information before a justice of the peace, in order to the issuing of a summons or warrant against any person charged with or suspected of any offence, shall be deemed to be a sufficient commencement of a prosecution within the meaning of the last preceding Article. (*l*)

(*l*) R. *v.* Willace, 1 East's P. C. 186.

ART. 33.

Provided that although a prosecution has been commenced within the time required by Article 31 of this Section, yet if such prosecution has not been proceeded with, no subsequent prosecution after that time has expired is maintainable. (*m*)

(*m*) Adam *v.* Inhab. of Bristol, 2 Ad. & Ell. 389; Russ. on Crimes, by Greaves, vol. i. 471.

ART. 34.

Witnesses.

A writ of subpœna may be issued from the Crown Office, to compel the attendance of a witness, either with or without a clause requiring the production of books, deeds, papers and writings in his possession or control, before grand juries in the Queen's Bench, or at any assizes or session of the peace. (*n*)

(*n*) See Corner's Crown Office Forms, 147.

ART. 35.

Such writ may also be issued from a court of oyer and terminer, gaol delivery, or session of the peace, to compel the appearance of any witness being within the jurisdiction of such court. (*o*)

(*o*) See 1 Chitty's C. L. 321; Dick. Quarter Sessions, by Talfourd, 129.

ART. 36.

If the subpœna issue from the Crown Office, and the witness refuse or neglect, without sufficient cause, to obey it, the Court of Queen's Bench will grant an attachment, on which he may be taken and committed until after the trial of the offender, when an order will be made for his discharge. (*p*)

(*p*) 8 T. R. 585; 6 T. R. 295; 3 Burr. 1687; 1 Chitty's C. L. 321.

ART. 37.

If the subpœna issue from a court of oyer and terminer, gaol delivery, or session of the peace, and the witness refuse or neglect, without sufficient cause, to obey it, he shall forfeit and pay such fine not exceeding £ as the court shall set on him.

ART. 38.

Expenses of witnesses.

A witness, upon being served with any such writ of subpœna as in Articles 34 and 35 of this Section is mentioned, is bound to obey such writ, although his expenses shall not have been paid or tendered him. (*q*)

(*q*) R. *v.* Cousens, Gloucester Spring Assizes, 1843.

ART. 39.

Service of process in any part of the United Kingdom out of England.

The service of every writ of subpœna or other process upon any person, in any part of the United Kingdom out of England, requiring the appearance of such person to answer or give evidence in any criminal prosecution in England, shall be as good and effectual in law as if the same had been served in England; and in case such person so served shall not appear according to the exigence of such writ or process, it shall be lawful for the court out of which the same issued, upon proof made of the service thereof to the satisfaction of such court, to transmit a certificate of such default under the seal of the same court, or under the hand of one of the judges or justices of the same, to the Court of Justiciary in Scotland, in case such service was had in Scotland, or in case such service was had in Ireland, to the Court of Queen's Bench in Ireland; and such last-mentioned courts respectively shall and may thereupon proceed against and punish the person so having made default, in like manner as they might have done if such person had neglected or refused to appear in obedience to a writ of subpœna or other process issued out of such last-mentioned courts respectively. (*r*)

(*r*) 45 Geo. III. c. 92, s. 3. The statute applies to subpœnas issued in any one part of the United Kingdom and served in any other part; but we have limited the provision as above, as the Digest is not intended to apply to Scotland or Ireland.

ART. 40.

Provided that neither of such last-mentioned courts shall in any case proceed against or punish any person for having made default by not appearing to give evidence in obedience to any writ of subpœna or other process for that purpose, unless it shall be made to appear to such court that a reasonable and sufficient sum of money to defray the expense of coming and attending to give evidence had been tendered to such person at the time when such writ of subpœna or other process was served upon such person. (*s*)

(*s*) 45 Geo. III. c. 92, s. 4.

ART. 41.

The evidence to be given before the grand jury is to be on oath, and for this purpose each witness who goes before them is to have administered to him, either

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previously in (*t*) court or by the foreman of the grand jury when such witness is before them, the following oath, that is to say, "The evidence you shall give "before the grand inquest shall be the truth, the whole truth and nothing but the "truth, so help you God."

(*t*) Haw. P. C. b. 2, c. 25, 5, 138; R. *v.* Dickinson, R. & Ry. 401; Talf. Dick. quarter sessions, 155. There is not at present any general law on this subject in England, although the usual, but not the universal practice, is to swear the witnesses in court. Provision is made by statute for the swearing of witnesses who are to go before grand juries in Ireland.

It has appeared to us that it would be an improvement in the process before a grand jury, if the witnesses were sworn before the jury, and not in court. The taking of an oath immediately before making a deposition may be thought expedient with reference to its impression on the mind of the deponent. The swearing in court is generally performed by a crier, out of the hearing of the judge, and with a great want of due solemnity. Added to which much loss of time and inconvenience is endured by taking the witnesses from the office of the clerk of the indictments into court to be sworn, and afterwards back again to the office to wait until their presence is required in the grand-jury room.

Art. 42.

Every person present in court who shall be required to give evidence before any grand jury, and who shall refuse to be sworn or give evidence accordingly shall forfeit and pay such fine not exceeding £ as the court shall set on him.

Art. 43.

Accessories, where principal felon dies or is otherwise discharged after conviction.

If any principal offender shall be convicted of any crime it shall be lawful to proceed against any accessory in the same manner as if such principal offender had had sentence pronounced against him, (*u*) notwithstanding such principal offender shall die or be pardoned or otherwise delivered before sentence, and every such accessory shall suffer the same punishment, if he be in anywise convicted, as he would have been liable to if the principal had been sentenced. (*x*)

(*u*) The words of the 7 Geo. IV. c. 64, s. 11, are, "as if such principal offender had been attainted thereof;" *i. e.*, in other words, "as if such principal had had judgment of death pronounced against him."

(*x*) 7 Geo. IV. c. 64, s. 11. The provision of the 7 Geo. IV. c. 64, from which the above Article is borrowed, applies only to felonies; but since the Act of Crimes and Punishments allows of accessories in the case of all crimes, we have made the rule general.

Art. 44.

In treason, two witnesses required.

No person shall be indicted for treason, or misprision of treason, but by and upon the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to one and the other of them to another overt act of the same treason. (*y*)

(*y*) 7 & 8 Will. III. c. 3. s. 2, in part. See also, 1 Edw. VI. c. 12, s. 22; 5 & 6 Edw. VI. c. 11, s. 12; and 1 & 2 P. & M. c. 10; 1 East's P. C. 128, 168; 1 Chitty's C. L. 320.

By the stat. 11 & 12 Vic. c. 12 (which repeals some of the treasons contained in Article 1. of Section I. of Chapter II. of the Act of Crimes and Punishments, and makes it felony, punishable as therein mentioned, to compass, &c., to deprive or depose the Queen from the style, honour or royal name of the imperial Crown of the United Kingdom or of any other of Her Majesty's dominions and countries, or to levy war against the Queen within any part of the United Kingdom, in order by force or constraint to compel her to change her measures or counsels, or in order to put any force or constraint upon, or in order to intimidate or overawe both Houses or either House of Parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom or any other Her Majesty's dominions or countries under the obeisance of Her Majesty, if such compassings, &c. are expressed, uttered or declared by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed), provides by Section 4, that no person shall be prosecuted for any felony by virtue of that Act, in respect of such compassings, &c., in so far as the same are expressed, uttered or delivered by open and advised speaking only, unless information of such compassings, &c., and of the words by which the same were expressed &c., shall be given upon oath to one or more justice or justices of the peace within six days after such words shall have been spoken, and unless a warrant for the apprehension of the person by whom such words shall have been spoken shall be issued within 10 days after such information shall have been given, *and unless such warrant shall be issued within two years next after the passing of that Act;* and that no person shall be convicted of any such compassing, &c., in so far as the same are expressed, &c. by open or advised speaking, except upon his own confession in open Court, or unless the words so spoken shall be proved by two witnesses.

We have not inserted any Article embodying the provisions of the above Section of the 11 & 12 Vic. c. 12, as its operation is limited to two years from the passing of the Act, according to the rule which we have adopted in other cases of omitting enactments which are to continue in force for a limited period only.

Art. 45.

Within what time indictments for treason to be found.

No person shall be indicted for treason or misprision of treason, unless the indictment be found by a grand jury within three years next after the date of the treason or offence committed. (*z*)

(*z*) 7 & 8 Will. III. c. 3, s. 5.

ART. 46.

Assassination, &c., of Queen, and forgery of the Royal Seals.

Provided that nothing in the last two preceding articles contained shall extend to any indictment for any treason in compassing, imagining, inventing, devising or intending death or grievous bodily harm to the King or Queen for the time being in possession of the Crown of this realm, or for misprision of any such treason. (*a*)

(*a*) 7 & 8 Will. III. c. 3, s. 13; 39 and 40 Geo. III. c. 93; 5 & 6 Vic. c. 51, s. 1.

ART. 47.

Within what time indictments relating to the customs to be exhibited.

No person shall be indicted for any offence against any Article of the Act of Crimes and Punishments, relating to the Customs, in any of Her Majesty's Courts of Record at Westminster, unless the indictment be found by a grand jury within three years next after the date of the offence committed. (*b*)

(*b*) 8 & 9 Vic. c. 87, s. 134, in part.

ART. 48.

Evidence.

An improper mode of swearing the witnesses before they go before the grand jury will not vitiate the indictment when found. (*c*)

(*c*) R. *v.* Russell, 1 Car. & Marsh. 247.

ART. 49.

A grand jury, where they entertain any doubt as to the legality of evidence produced before them, may ask the advice of the court. (*d*)

(*d*) Several authorities lay it down that a grand jury ought only to admit legal evidence: and there can be no question that it is desirable that they should adopt this course. It is to be feared, however, that it cannot be expected that grand juries, especially at quarter sessions, are at all conversant with the rules of evidence. There is no one to take care that no evidence which is not legal evidence is produced before them; and the reception of improper evidence would not vitiate the finding of a grand jury, even if there were adequate means of discovering that such evidence had been admitted. This is one of the reasons which detracts from the weight which ought to be due to the finding of a grand jury. Under all the circumstances, we think it better to omit the rules in the Act of Procedure which make it obligatory on grand juries to ask the advice of the court where they doubt as to the legality of evidence, and which require the best evidence to the exclusion of all hearsay or merely secondary or other objectionable evidence.

The Articles as they stand at present in the Act of Procedure are as follows:—

"ART. 52.

"As matter of instruction to a grand jury, they are to be informed that they ought not to receive any "but legal evidence, and that in case of doubt they ought to ask the advice of the court. (*)

"(*) Hawk. P. C. b. 2, c. 25, s. 145."

"ART. 53.

"The best evidence is to be required, to the exclusion of all hearsay or merely secondary or other "objectionable evidence which would not be received on the trial in chief. (*)

"(*) Haw. P. C. b. 2, c. 25, ss. 138, 139, 145; 3 Camp. 401."

ART. 50.

A grand jury is not bound to hear exculpatory evidence. (*e*)

(*e*) 1 Chitty's C. L. 317. A grand jury is, by the present law, not *bound* to hear exculpatory evidence. As the authorities are silent as to its being *competent* for grand juries to hear such evidence, the above Article leaves it to their discretion to hear such evidence or not. It is conceived that they ought to hear such evidence where they have reason to believe that it would materially affect their opinion upon the case, especially where the exculpatory matter may be elicited from the witnesses for the prosecution. Why the grand jury should not hear exculpatory evidence depends perhaps more on reasons of convenience than upon any satisfactory principles of justice. According to the present system, indeed, whilst neither the accused nor any person on his behalf, nor the public are admitted to appear before the grand jury, the suggestion of exculpatory matters is not likely to be of frequent occurrence.

ART. 51.

Of the finding of a grand jury.

A grand jury ought to find a bill of indictment to be true where the result of the evidence produced before them is such as in their judgment to be reasonably sufficient to warrant a conviction by a petit jury. (*f*)

(*f*) They present upon oath; they therefore state upon oath their belief that the evidence is sufficient to warrant inquiry upon the evidence already adduced; were their presentment on oath to mean anything less than this, it is difficult to say what limit there would be to the degree of mere suspicion on which they might act; they clearly would have no right to act on mere speculation or conjecture that evidence would be offered before another jury more cogent than that already given. Although their finding import their opinion that a jury in chief might properly convict, it by no means imports an opinion that they OUGHT TO CONVICT, or that the grand jury would on that evidence alone find the accused guilty.

ART. 52.

If a grand jury be not satisfied with the sufficiency of the evidence offered to them on the part of the prosecution to warrant their finding a true bill, they may hear other evidence in order to enable them to arrive at a proper conclusion. (*g*)

(*g*) 1 Chitty's C. L. 318.

ART. 53.

The finding of a grand jury must be absolute and unconditional. (*h*)

(*h*) Com. Dig. Int. A; Bac. Ab. Int. D; Haw. P. C. b. 2, c. 25, s. 2; 1 Leon. 287; Yel. 15.

ART. 54.

Provided that where it shall appear, from the evidence before the grand jury, that the accused is insane, if such evidence exists as would constitute a sane person guilty of the offence charged, such grand jury is to find the insanity of the accused, and that, subject thereto, the bill is a true bill. (*i*)

(*i*) R. *v.* Hodges, 8. C & P. 195, per Alderson B. It has been stated by some authorities that a grand jury ought to return a "true bill," notwithstanding they are satisfied of the insanity of the accused. It seems unreasonable, however, to require the grand jury to return a finding contrary to their convictions; and they may justly entertain scruples as to such a finding being compatible with their oaths. On the other hand, it does not seem expedient that the grand jury should simply ignore a bill in such cases; as well because the question of sanity cannot in general be satisfactorily determined in the grand-jury room, as because, in the case of an ignored bill, the accused who is acquitted on the ground of insanity could not be confined when necessary during Her Majesty's pleasure under the provisions of the statute. It seems therefore proper to allow a special finding in such cases which may satisfy the consciences of the grand jury without precluding a trial.

ART. 55.

If the bill of indictment contain several counts, the grand jury may find a true bill as to one or more of them only, and find no true bill as to another or others of them. (*k*)

(*k*) Haw. P. C. b. 2, c. 25, s. 2; Bac. Ab. Indt. D.; 1 Cowp. 325; 1 Chitty's C. L. 323.

ART. 56.

The grand jury cannot find part only of the charge contained in any one count to be true. (*l*)

(*l*) 2 Hale, 162; Bac. Ab. tit. Indt. D. It has been said that the charge may be reduced by an alteration of the indictment in the presence of the jury. See the authorities referred to above. It seems, however, to be the better course to lay down a general rule.

ART. 57.

The grand jury may find a bill of indictment to be true against one or more of several persons, and not to be true against the rest. (*m*)

(*m*) 1 Chitty's C. L. 324.

ART. 58.

The grand jury are to present the result of their finding publicly in court. (*n*)

(*n*) 1 Chitty's C. L. 324; Steph. C. L. 256.

ART. 59.

When indictment complete.

On such presentment of a bill of indictment in court indorsed "a true bill," the indictment is complete, and the indorsement is part of it. (*o*)

(*o*) Yelv. 99; Com. Dig. Indt. A.

ART. 60.

The court may alter an indictment so far as to amend any mistake in it which is merely clerical or in some matter of form; or so far as, under the authority hereinafter in Article 19 of Section 7 of Chapter VII. of this Act given, to make the indictment agree with the proof at the trial where any variance shall appear between any matter in writing or in print, produced in evidence, and the recital or setting forth thereof in the indictment. (*p*)

(*p*) We recommend the substitution of the above Article for Articles 64 and 65 of Section 1 of Chapter II. of the Act of Procedure. We do not think it necessary to continue the form of asking the grand jury, if the Court may amend. The following are the Articles alluded to:—

"ART. 64.

"The jury having presented one or more bill or bills of indictment, are to be asked by an officer of the court if they agree that the court shall amend matter of form, altering no matter of substance. (*).

"(*) 1 Chitty's C. L. 324; Dick. Sess. 158.

"ART. 65.

"If such assent be given, the court has jurisdiction to alter any mistake which is merely clerical; "but no amendment or alteration can be made in any matter of substance."

ART. 61.

Secrecy to be observed by grand jurors.

A grand juror is not to disclose what transpires in evidence before himself and his fellows on criminal inquiries. (*q*)

(*q*) 2 Hale, 161; Chitt. C. L. 317; 4 Black. Comm. 126. See the punishment for one who offends in this respect, Chap. IV. Sect. 4, Art. 7 of the Act of Crimes and Punishments.

ART. 62.

The rule contained in the last preceding Article does not extend to exclude he evidence of a grand juror concerning the perjury of a witness who gives evid tce on the trial at variance with that which he gave before the grand jury. (*r*)

(*r*) 4 Black. Comm. 126, Christian's note (5); Chitt. C. L. 317.

Though it is laid down in the authorities that a grand juryman may give evidence to prove that a witness made a statement different from that which he made before the petty jury, yet it seems not to have been contemplated that a witness could be indicted for perjury before a grand jury. This circumstance must very much derogate from the credit to be given to findings before grand juries. And it seems an anomaly to administer oaths where there are no practical means of enforcing them by legal penalties.

ART. 63.

Grand jury room not an open court, and no person to remain except such as grand jury think necessary.

The room to which the grand jury shall retire, in order to the making of their presentments, shall not be deemed an open court for that purpose; and no person shall have access to, or be, or remain in such room, except such as the grand jury shall think necessary for the ends of justice and for facilitating the business before them. (*s*) *

(*s*) We recommend the substitution of the above Article for the following Articles in the Act of Procedure:—

"ART. 69.

Mode of proceeding before grand juries.

"The prosecutor, or where the bill of indictment is preferred in the Court of Queen's Bench, one of "the masters, or a clerk appointed for that purpose from the Crown Office, may attend to assist in "conducting the evidence on the part of the Crown. *

"* Kel. 8; 1 Chitty's C. L. 317; 12 Vin. Ab. 38; Hawk. P. C. b. 2, c. 46, s. 93, ed. by Leach; "Tri. per pais, 387; Corner's P. 123.

"ART. 70.

"On indictments for high treason, any of the counsel for the Queen may so attend as in the last "preceding Article is mentioned;* but such counsel is bound not to disclose what may transpire. †

"(*) Kel. 8; 1 Ch. C. L. 317.

"(†) Tri. per pais, 387. Haw. P. C. b. 2, c. 46, s. 93."

Great importance appears to have anciently attached to secrecy in the investigations of grand juries. This circumstance is to be attributed to the common practice of grand juries in ancient times to take the first steps in criminal inquiries; and it was apprehended that if publicity were given to such inquiries, an accused person, or his accomplices, might escape from justice. It is obvious that secrecy derogates very much from the authority that might be due to the findings of grand juries; and that it very often occasions a failure of justice. In modern times the rule has been relaxed in the instances mentioned in the two Articles for which we propose to substitute the one in the text. But it will be seen that there is some uncertainty if not inconsistency as to the obligation of secrecy in such cases.

As in the instance of magistrates instituting preliminary inquiries, it may seem expedient to facilitate the admission of the public to inquiries by a grand jury, allowing, however, if it be thought any longer necessary, a discretionary power of exclusion. It is conceived also that, in most instances, it would conduce to rendering the findings of grand juries more effectual for protecting accused persons from frivolous or malicious accusations if the accused were allowed to be present whilst the charge against him is under the investigation of a grand jury.

ART. 64.

Two indictments for the same offence.

An indictment is valid although another indictment has been found charging the same offence in law and fact, or the same facts wholly or in part.

ART. 65.

When bill ignored, a second indictment ought not to be preferred during the same assizes.

After a bill has been ignored by a grand jury, another bill containing the same charge may be sent before the grand jury at a subsequent assizes or sessions, but ought not to be sent before the grand jury during the same assizes or sessions at which it was ignored. (*t*)

(*t*) R. *v.* Humphreys, 1 Car. & Marsh, 601.

SECTION 2.

Of the Body of the Indictment.

ART. 1.

EVERY indictment shall commence "The Jurors for the Queen upon their oath present that," [setting forth such presentment according to the rules hereinafter in this section contained]; but need have no formal conclusion.

Chap. II., Sec. 2.

Requisites.

ART. 2.

Every indictment must contain a description of:—

1st. The party charged.

2nd. The offence charged.

3rd. The time and place when and where, and the person, thing or other subject matter on or with respect to which the offence charged has been committed, and, in particular cases, such further circumstances as are hereinafter in this Section made requisite. (*a*)

(*a*) It appears requisite, with reference to the objects of an indictment, that the offence charged be accurately stated. Considerable advantage as to the certainty with which this may be effected results from the nature of a general Act of Crimes and Punishments; for it will be only necessary to refer to a particular Article in the Act, from which the nature of the offence charged will clearly appear. It will be incumbent on those who conduct any prosecution to substantiate a charge of the accused having done or omitted something which brings his conduct strictly within the import of the Article of the Act of Crimes and Punishments cited in the indictment.

But it is further desirable, with reference to the same objects of an indictment, that a detail should be afforded of the circumstances characterizing the offence of the accused; inasmuch as a simple reference to the Article which it is alleged is applicable to the prisoner's conduct might not sufficiently distinguish the accused's criminal act or omission from a multitude of other criminal acts or omissions of which he might have been guilty, and to which the same Article would be equally applicable.

As to which desideratum it must, however, be considered that in the vast majority of cases the preliminary investigations have fully apprised the prisoner of the nature of the charge upon which he is about to be tried. He requires no indictment to enable him to distinguish between different offences to which the same Article is applicable; and in practice, where the indictment is read immediately before the trial takes place, the reading of it is of little use to him. So far as regards the accused, he may generally derive all the advantages of an indictment at his trial by having been previously furnished with a copy of the depositions.

Nevertheless, for the purpose of avoiding any possible embarrassment to the accused in shaping his defence, and more especially for informing the jury of the precise nature of the matter upon which they are to decide, and to preserve an accurate record of the subject of the decision, should the knowledge of it become important in any future proceedings, it would be desirable, if it were practically conducive to the attainment of the ends of justice, that all the circumstances of an offence, whereby it might be clearly distinguished from every other offence to which the same Article of the Act of Crimes and Punishments was applicable, should be set forth with undeviating correctness.

But it has been found by experience that to require extreme accuracy in the detail of the circumstances of an offence would be productive of much greater disadvantages in the administration of criminal justice than would be counterbalanced by any benefit that could be anticipated from it; for even after the allowance of a great number of exceptions to the rule requiring accuracy in the description of the circumstances of an offence, and the introduction of various privileged devices for depriving that rule of its practical operation, the defeat of justice by means of objections to what have been termed flaws in indictments has generally been considered a reproach to the English criminal law.

We incline to think, indeed, that it is expedient to require a formal detail of circumstances as regards the time, place, means, and nature of an offence further than a bare reference to a particular Article of the Act of Crimes and Punishments, because, practically, in a great majority of instances, the description of the circumstances will be wholly true, or, if not true in every particular, will be so far correct as to accomplish, to a considerable extent, the objects of an accurate detail of circumstances in an indictment. And it may be presumed that any wilful or careless deviation from the proveable circumstances of an offence, though it might be legally permitted, would be animadverted upon by the judge. Thus, according to the present practice, although an indictment is sustainable in law, notwithstanding it allege an offence to have been committed a dozen years before the real time of its commission, or notwithstanding it may allege that the accused poisoned an individual with arsenic, although it is proved at the trial that the poison he used was prussic acid, yet, practically speaking, indictments generally adhere sufficiently close to the real dates of offences, and to the real means by which a death may have been occasioned, to answer to a considerable extent the purposes for which such documents are required.

And the statement of a detail of circumstances, constituting a particular offence charged, where it will be admitted, on the part of the prosecution, that there is no probability of materially varying the statement by any evidence that is capable of being adduced, does often afford the means of deciding before the trial commences, whether, supposing the circumstances alleged to be true, or substantially so, they constitute an offence within the meaning of the Article of the Act of Crimes and Punishments cited in the indictment. Although this object might frequently be attained by a reference to the depositions, yet it is more conveniently attained by means of an indictment, and thus the requiring a detail of circumstances facilitates the administration of justice.

Thus, perhaps, a satisfactory reason may be given why an indictment should be held bad which did not contain certain circumstances regarding an offence, for instance, the time and place of its commission; but, nevertheless, shall be held good though it state those circumstances incorrectly; notwithstanding an incorrect statement might, *primâ facie*, be thought to perplex and mislead all parties more than no statement at all.

ART. 3.

Every indictment must also contain such averments as show, if they be true, that the party charged is guilty of the crime charged.

ART. 4.

Accused, how to be described.

The party charged is to be described by his Christian and surname, or by the name or names by which he is most commonly known. In case of doubt he may be variously described (*b*) under an alias. He is also to be described by the

addition of his estate, or degree, or of his profession, art, mystery, or trade, (*c*) and of the town, hamlet, or place, and county in which he was or is conversant.

(*b*) It has been held that a person cannot have two Christian names, although he may have two surnames, this however seems to be an useless distinction.

(*c*) As the statute 7 Geo. IV. c. 64, s. 19, has made provision for amendment in case of any misnomer, &c., verified by affidavit, we have deemed it to be unnecessary to embody the numerous decisions in the statute of additions, 1 Hen. V. c. 5.

ART. 5.

A woman is to be described as single woman, spinster, or widow, or as the wife of a person described by his name and addition, according to the fact.

ART. 6.

A peer is to be described by his Christian name, with the addition of his title of dignity.

ART. 7.

In an indictment against the inhabitants of a county, or other district, it is unnecessary to describe any of them by their names or additions.

ART. 8.

In an indictment against any person for misconduct as an officer, it shall be sufficient to describe him as being such officer, without any direct averment that he is such officer. (*d*)

(*d*) Hawk. P. C. b. 2, c. 25, and 111, 112.

ART. 9.

In describing the offence charged, the Article of the Act of Crimes and Punishments by which such offence is made punishable must be specified; and the words used in any such Article to describe such offence are, so far as is consistent with the frame of an indictment, and with the statement of the circumstances required by Article 2 or any other Article of this Section, to be used in the indictment, (*e*) unless the want of such words, or any of them, be supplied by others of a meaning precisely equivalent. (*f*)

Offence, how to be described.

(*e*) With respect to a statement of circumstances which shall constitute an offence within the meaning of any Article of the Act of Crimes and Punishments many inconsistencies at present exist. In burglary, for example, it is sufficient to allege a "breaking and entering" in those terms; whereas the circumstances which in law amount to a breaking or entering have been the subject of numerous legal decisions. But it is unnecessary to set forth any particulars, whereby it might appear on the face of the record whether they amounted to a breaking and entering at law. And in various other cases a technical rather than a popular statement of circumstances is permitted. In indictments for murder, on the other hand, more of popular detail is required,—a peculiarity which is, in some measure, owing to the obsolete law of deodands. And yet, in stating the details of a murder, there is a distinction between circumstances which must be strictly proved, and such as admit of venial variances. Though, if it be alleged that the accused broke a certain house, it need not be stated whether it was by means of the window, door, or chimney; yet it is not sufficient to allege that A murdered B; it must be further stated, whether it was by drowning, poisoning, or wounding. And, moreover, the kind of poison and mode of wounding with a gun, sword, or stick, must be stated; and yet those latter circumstances, though imperatively required to be stated, may be disproved without the indictment losing its efficacy. The length and depth of a wound are also stated, but need not be proved. The time and place of committing offences is rarely required to be proved as laid, but great rigour is used with regard to persons specified as owners of property or otherwise; a rigour which often leads to the use of a multiplicity of counts.

The adoption of a series of forms in which the circumstances of an offence should be described as recommended by us in the terms used in the Article defining the offence, with the addition of times, places, persons, and particular articles of property, would be found, in many cases, quite as explicit as the forms of indictments in common use. In some few instances the statement of circumstances would be more curtailed than at present; but that, it is hoped, would occur only where unnecessary details are at present insisted on, often without any obligation to prove them accurately, and inconsistently with the generality of detail allowed in other cases. Some particular forms, especially in the instances of crimes connected with writings or spoken words, would properly demand greater particularity than would result from repeating the language of Articles in the Act. But there would be no difficulty in settling these forms agreeably with the principles peculiarly and obviously applicable to them.

It is manifest that the adoption of the forms proposed would relieve the Criminal Law from numerous refined distinctions resting upon a multitude of decisions, and would put an end to those frequent flaws in indictments by which justice is often defeated.

It is to be observed also that, according to the present law, in charging statutory offences, it is generally sufficient to follow the language of the statute. Thus, averments that acts were done "maliciously," "wilfully," "unlawfully," "knowingly," are sufficient, where such are the statutory characteristics of offences. So the terms "cut," "wound," or "maim," may be used according to statutory language without any more explicit detail of the injury sustained.

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The recent statute (11 and 12 Vict. c. 46, s. 3), which allows accessories to be indicted as principals, is a strong example not only of the want of particularity, but even the inaccuracy at present allowed in certain indictments.

(*f*) Where technical words are used in the definition of an offence, they ought to be translatable into ordinary popular language, and if in such case words of an import equivalent to those used in the definition be employed in framing the indictment, it would seem to be unreasonable, as well as unnecessary, to hold the indictment to be defective by reason of the manner of expression, when it truly and completely charged an indictable offence. It may, however, happen that a particular term may be used in defining the offence, which cannot be supplied by any other words of precisely the same meaning; in such case, the use of the very terms used in the definition, is obviously essential to the certain and effectual description of an offence within that definition. Except in cases where precise technical words are required to be used such words may be employed as are in ordinary use.—Lord Ellenborough, 5 East, 259, 260; 2 East, 33, 34.

ART. 10.

Matter of surplusage.

Matter of mere surplusage which does not vitiate the sense of an indictment may be rejected. (*g*)

(*g*) 1 Leach, 109; 1 Chitty's C. L. 216.

ART. 11.

Certainty.

Indictments must not contain disjunctive averments, so as to leave it uncertain what offence is intended to be charged. (*h*)

(*h*) Haw. P. C. b. 2, c. 25, s. 58; Bac. Ab. Indt. G, 1; Com. Dig. Indt. G. 3; 5 Mod. 137, 138; 1 Chitty's C. L. 236.

ART. 12.

Place.

In describing the place where an offence has been committed, the indictment must show, by sufficient allegations, that the offence charged was committed at some place within the jurisdiction of the court, either by express averment without specifying the particular place, or without an express averment by stating it to have been committed at some place alleged to be within the county or some other district which will be noticed as being within the jurisdiction of the court.

ART. 13.

Provided that where the offence charged shall have been begun at one place and completed at another, it may be alleged to have been committed at either.

ART. 14.

Admiralty offences.

Provided also that where the offence charged shall have been committed on the high seas, or in any other place within the jurisdiction of the Admiralty of England, it shall be alleged to have been committed "on the high seas." (*i*)

(*i*) See 7 and 8 Vic. c. 2, s. 2.

ART. 15.

Accessories, &c.

Accessories to any crime within the meaning of any Article of the Act of Crimes and Punishments, may be charged as principals. (*j*)

(*j*) 11 and 12 Vic. c. 46, s. 1. Accessories, as defined by the Act of Crimes and Punishments, are confined to accessories before the fact; accessories after the fact are abolished as such, and their offence made a substantive one against the administration of justice. It is therefore unnecessary to embody in the Digest the provisions of the 11 and 12 Vic., c. 46, which authorizes the indictment of accessories after the fact, either as such, or for a substantive felony.

ART. 16.

Provided that if an accessory be indicted as such, then, whether he be separately indicted, or be indicted together with any principal, the commission of the principal offence by such principal shall be shown with proper allegations charging the accessory as such within Chap. I. Section 4 of the Act of Crimes and Punishments. (*k*)

(*k*) The recent statutory provision (11 and 12 Vic. c. 46, s. 1) allowing accessories to be indicted as principals, is a remarkable example of the little weight attached by the Legislature to particularity and accuracy in stating the circumstances of an offence. According to the present law, however, it appears that notwithstanding the statute, an accessory may still be indicted as such; and it seems advisable not to preclude a statement in such cases more closely corresponding with the reality of facts than is absolutely required. But in such cases an acquittal as accessory ought not to preclude another indictment against the same party as principal, unless, indeed, when a party is indicted as accessory the record might be amended by charging him as principal, subject to the power of the Court to postpone the trial.

It may be thought expedient, with reference to the future uses of the indictment, that after the verdict the offence of an accessory should, by amending the record when necessary, be stated according to the real facts.

ART. 17.

Where a person shall be indicted as an accessory, it shall be sufficient, in case the principal shall have been convicted, to state in the indictment against the

accessory the record of the conviction of the principal, and to allege the procuring and promoting by the accessory, by the means stated in the Act of Crimes and Punishments, Chap. I. Section 4, Article 8.

ART. 18.

Different acts of participation.

Several persons implicated in the same criminal transaction may be charged in the same indictment with different acts of participation where such acts constitute distinct offences. (*l*)

(*l*) Several implicated in the same homicide may be charged with different degrees of homicide.—9 Co. 67; 3 Buls. 206; 1 Leach, 360.

ART. 19.

Provided that where any such act of participation as in the last preceding Article is mentioned amounts to treason, and any other such act to felony or misdemeanor only, several persons cannot be charged in the same indictment with such acts.

ART. 20.

Attempts.

In an indictment for attempting to commit, or for endeavouring to procure, promote or compel any other person to commit, any crime, the crime intended to have been perpetrated must be specified, together with the person, thing or other subject matter on or with respect to which such crime was intended to have been perpetrated.

ART. 21.

Conspiracy.

In an indictment for conspiracy, the crime to be committed, together with the person, thing or other subject-matter on or with respect to which such crime was to be committed, or the other unlawful object to be attained in pursuance of such conspiracy, or the unlawful means intended to be used in effecting the object of such conspiracy, must be specified.

ART. 22.

Particular means.

Where the use of particular means to effect a criminal purpose is by the Article of the Act of Crimes and Punishments by which the offence charged is made punishable, essential to such offence, such means must be specified in the indictment.

ART. 23.

Blasphemy, libel, perjury, sending threatening letters, &c.

In indictments for speaking blasphemous or seditious words, publishing libels, perjury, sending of threatening letters, and all other offences to which the speaking or writing of particular words is essential, the very words must be stated as alleged to have been spoken or written by the person charged. (*m*)

(*m*) The power of amending incorrect descriptions of written instruments is given by statutes 9 Geo. IV. c. 15, in the case of misdemeanors, and by the recent statute 11 and 12 Vic. c. 46, s. 4, in the case of other offences, to courts of oyer and terminer and general gaol delivery, but has not hitherto been accorded to courts of quarter sessions. There appears to be no sufficient reason for this distinction. Among other advantages which would follow from an extension of the power of amendment to courts of quarter sessions, would be the dispensing with numerous subtle distinctions which have given rise to a multitude of decisions with reference to setting forth written instruments in indictments, after such introductory words as "according to the tenor following," "as follows," "in manner and form following," "according to the following purport." These are necessary also respecting the effect of words misspelt, which would be rendered unnecessary if the power of amending were granted to courts of quarter sessions.

ART. 24.

Perjury.

In indictments for perjury, or for subornation of perjury, it must also be stated by what court, or before whom the oath was taken (averring such court or person or persons to have a competent authority to administer the same). (*n*)

(*n*) See 23 Geo. II. c. 11, ss. 1 and 2.

ART. 25.

Sufficient to describe forged instruments as in larceny.

Provided that in indictments for forging, or for offering, uttering, publishing, disposing of, or putting off any instrument or writing, it shall not be necessary to set forth any copy or fac-simile thereof, but it shall be sufficient to describe the same in such manner as would sustain an indictment for stealing the same. (*o*)

(*o*) 2 and 3 Will. IV. c. 123, s. 3. It has been decided that the 2 and 3 Will. IV. c. 123, s. 3, (which does not contain the words in italics,) applies to all forged documents, whether the subject of larceny or not; R. *v.* Vaughan, 8 C. and P. 276. The judges thought that it should be read thus: "It shall be sufficient to describe the instrument in such manner as would sustain an indictment for stealing the same, supposing it to be the subject of larceny." It is unnecessary to insert any such explanatory rule in the Digest, as, according to our definition of theft in the Act of Crimes and Punishments, everything which is the subject of forgery is the subject of theft.

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ART. 26.

Unlawful oaths. Provided also that in indictments for any offence specified in Article 1 of Section 2, of Chapter II., or in either of Articles 22 and 23 of Chapter VI. of the Act of Crimes and Punishments, it shall be sufficient to set forth the purport of any oath or engagement therein mentioned, or some material part thereof. (*p*)

(*p*) 37 Geo. III. c. 123, s. 4; 52 Geo. III. c. 104, s. 5.

ART. 27.

False pretences. A charge of obtaining anything by means of any false pretence must state the particular pretence used. (*q*)

(*q*) 1 Chitty's C. L. 275.

ART. 28.

Names of persons. The name of any person against whom the offence charged has been committed, or whose description is involved in the statement of such offence, must, except where it is otherwise provided by any Article of this Section, be specified in the indictment. (*r*)

(*r*) Haw. C. P. b. 2, c. 25, s. 71; Bac. Ab. Indict, G. 2; 2 Rol. Ab. 80.

ART. 29.

Persons, description of. Where any such person as in the last preceding Article is mentioned is required to be named, he is to be described by his Christian and surname, or by the name or names by which he is usually known. (*s*)

(*s*) 2 Hale, 244, 245; Haw. P. C. b. 2, c. 25, s. 72.

ART. 30.

Official description. Where the offence charged consists in misconduct towards an officer, it shall be sufficient to describe such person in the indictment as being such officer, without any direct averment that he is such officer. (*t*)

(*t*) Haw. P. C. b. 2, c. 25, s. 111, 112; Cro. Jac. 610; 2 Roll. 226; Moore, 606; 2 Leon. 5.

ART. 31.

Circumstances. Individual things incident to the description of an offence must be described by their ordinary names, with their number and such other particulars as may serve to identify them.

ART. 32.

Embezzlement of money. Provided that it shall be sufficient in any indictment for any offence against Article 1 of Section 1 of Chapter VIII., or Article 7 of Section 3 of Chapter XVIII., of the Act of Crimes and Punishment, except where the offence shall relate to any chattel, to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly. (*u*)

(*u*) 7 and 8 Geo. IV. c. 29, s. 48, in part; 2 Will. IV. c. 4, s. 3, in part.

ART. 33.

Owner. In every indictment wherein it shall be necessary to make any averment concerning property, the name of the owner shall, unless it be otherwise provided by any Article of this Section, be specified.

ART. 34.

Ownership of moveable property. Provided that any moveable thing or any fixture may be described as the property of a person specified, or of such person and another, or of such person and others, although he or they be but the special owner or owners of such moveable thing or fixture, as bailee or bailees, or otherwise.

ART. 35.

Provided that if the name of any such person or owner as is mentioned in Article 28 or Article 33 of this Section respectively be unknown, in such case

it may be alleged, according to the fact, that the name of any such person is unknown to the jurors. (*x*)

(*x*) Haw. P. C. b. 2, c. 25, s. 71; 2 East, P. C. 651, 781; 2 Hale, 181. But it is said that if the name be known, the indictment will be insufficient, 2 East, P. C. 651, 781; 3 Camp. 265, note; Haw. P. C. b. 2, c. 25, s. 71; 2 Leach, 578.

ART. 36.

Written instruments of justice and testamentary instruments.

It shall not, in any indictment for any offence against Article 35 of Section 5 of Chapter V., or Article 54 of Section 1 of Chapter XVIII. of the Act of Crimes and Punishments, be necessary to allege that the thing in respect of which the offence is committed is the property of any person. (*y*)

(*y*) 7 and 8 Geo. IV. c. 29, ss. 21, in part; and 22, in part.

ART. 37.

Muniments of title.

It shall be sufficient in an indictment for any offence against Article 55 of Section 1 of Chapter XVIII. of the Act of Crimes and Punishments, to allege the thing stolen to be evidence of the title or of part of the title of the person, or of some one of the persons having a present interest, whether legal or equitable, in the real estate to which the same relates, and to mention such real estate, or some part thereof. (*z*)

(*z*) 7 and 8 Geo. IV. c. 29, s. 23, in part.

ART. 38.

Fixtures in public places.

It shall be sufficient to describe any moveable thing or any fixture placed or fixed for the purpose of public use or ornament in any public place, and being the subject of averment in any indictment, as being so put and placed, according to the fact, in the public place specified, without any description of ownership.

ART. 39.

Of real property.

It shall be sufficient to describe any land, dwelling-house, building, or other real property, the subject of averment in any indictment, as being in the actual possession of a person specified, or of such person and another, or of such person and others, according to the fact, without stating any property or ownership. (*a*)

(*a*) It appears to us that the allowing such a mode of allegation might be convenient, *e. g.* in the case of burglary, where the ownership was doubtful.

ART. 40.

Of funeral habiliments, &c.

It shall be sufficient to describe any funeral habiliment of any dead body, or any coffin, shroud, or other moveable thing, used in or about the interment or burial of any dead body, and being the subject of averment in any indictment, as being such habiliment, coffin, shroud, or other article, and as so used, and being in a grave, vault, churchyard, or cemetery, according to the fact. (*b*)

(*b*) 2 Hale, 181; Bac. Ab. Indictment, G. 2.

ART. 41.

Of property belonging to churches, &c.

It shall be sufficient in charging any offence in respect of any church or chapel, or any fixture, furniture, books, or other moveable thing, belonging to the same, or kept or used therein, to describe such building as a church or chapel, and to describe any such fixture, furniture, or moveable thing, as belonging to such church or chapel.

ART. 42.

Property of corporations, how to be laid

In any indictment wherein it shall be requisite to state the ownership of any thing, whether real or personal, which shall belong to or be in the possession of any body of persons having a corporate capacity and corporate name, such thing must be stated to belong to them in their corporate name. (*c*)

(*c*) R. *v.* Patrick and Pepper, 1 Leach, 253; 2 East, P. C. c. 22, s. 7, p. 1059; 2 Russ. 99.

ART. 43.

Property of unincorporated bodies how to be laid.

Any thing belonging to or in the possession of any body of persons not having a corporate capacity and corporate name, must not be described as belonging to such body. (*d*)

(*d*) R. *v.* Sherrington and Bulkley, 1 Leach, 513; R. *v.* Beacall Ry. and M's C. C. R. 15; 2 Russ. 100–1.

ART. 44.

How property of partners to be laid.

It shall be sufficient in any indictment wherein it shall be requisite to mention for any purpose any partners, joint-tenants, parceners, or tenants in common, to name one of such persons, adding "and another or others," as the case may be; and this provision shall be construed to extend to all joint-stock companies and trustees. (*e*)

(*e*) 7 Geo. IV. c. 64, s. 14. We have modified this Section of the 7 Geo. IV. c. 64, in conformity with the rules above suggested by us as to ownership.

ART. 45.

Property belonging to counties, how to be laid.

It shall be sufficient in any indictment for any crime committed in, upon, or with respect to any bridge, court, gaol, house of correction, infirmary, asylum, or other building erected or maintained in whole or in part at the expense of any county, riding, or division, or on or with respect to any goods or chattels provided for or at the expense of any county, riding, or division, to be used for making, altering, or repairing any bridge, or any highway at the ends thereof, or any court or other such building, as hereinbefore in this Article is mentioned, or to be used in or with any such court or other building, to state any such property, real or personal, to belong to the inhabitants of such county, riding, or division, and it shall not be necessary to specify the names of any of such inhabitants. (*f*)

(*f*) 7 Geo. IV. c. 64, s. 15.

ART. 46.

Property ordered for the use of the poor, how to be laid.

It shall be sufficient in any indictment for any crime committed in, upon, or with respect to any workhouse or poorhouse, or on or with respect to any goods or chattels provided for the use of the poor of any parish, township, hamlet, or place, to be used in any workhouse or poorhouse in or belonging to the same, or by the master or mistress of such workhouse or poorhouse, or by any workmen or servants employed therein, to state any such property to belong to the overseers of the poor for the time being of such parish, township, hamlet, or place, and it shall not be necessary to specify the names of all or of any of such overseers. (*g*)

(*g*) 7 Geo. IV. c. 64, s. 16, in part.

ART. 47.

Property relating to the repair of highways, how to be laid.

It shall be sufficient in any indictment for any crime committed on or with respect to any materials, tools, or implements provided for making, altering, or repairing any highway within any parish, township, hamlet or place, otherwise than by the trustees or commissioners of any turnpike-road, to aver that any such things are the property of the surveyor or surveyors of the highways for the time being of such parish, township, hamlet or place, and it shall not be necessary to specify the name or names of any such surveyor or surveyors. (*h*)

(*h*) 7 Geo. IV. c. 64, s. 16, in part.

ART. 48.

Property of turnpike trusts, how to be laid.

It shall be sufficient in any indictment for any crime committed on or with respect to any house, building, gate, machine, lamp, board, stone, post, fence, or other thing erected, or provided in pursuance of any Act of Parliament for making any turnpike-road, or any of the conveniences or appurtenances thereunto respectively belonging, or any materials, tools, or implements provided for making, altering, or repairing any such road, to state any such property to belong to the trustees or commissioners of such road, and it shall not be necessary to specify the names of any such trustees or commissioners. (*i*)

(*i*) 7 Geo. IV. c. 64, s. 17.

ART. 49.

In indictments relating to sewers, property how to be laid.

It shall be sufficient in any indictment for any crime committed on or with respect to any sewer, or other matter within or under the view, cognizance, or management of any Commissioners of Sewers, to state any such property to belong to the Commissioners of Sewers within or under whose view, cognizance, or management any such things shall be, and it shall not be necessary to specify the names of any of such commissioners. (*k*)

(*k*) 7 Geo. IV. c. 64, s. 18.

ART. 50.

Property belonging to Postmaster-General, how to be laid.

It shall be sufficient in any indictment for any offence committed upon, or in respect of any property which may be laid in, or stated to belong to the Postmaster-General, to state any such property to belong to, and to lay it in "Her Majesty's Postmaster-General;" and it shall not be necessary to specify the name or addition of any such Postmaster-General; and whenever, in any indictment for any offence against any Article of the Act of Crimes and Punishments relating to the Post Office, it shall be necessary to mention for any purpose whatsoever Her Majesty's Postmaster-General, it shall be sufficient to describe such Postmaster-General as "Her Majesty's Postmaster-General," without any further or other name, addition or description whatsoever. (*l*)

(*l*) 3 and 4 Vic. c. 96, s. 66.

ART. 51.

Property, where embezzled by public officer, to be laid in the Queen.

It shall be sufficient in any indictment for embezzlement or fraudulent application, or disposition against the provisions of Article 1 of Section 1 of Chapter VIII., of the Act of Crimes and Punishments, of any moveable thing, to state such thing to belong to Her Majesty. (*m*)

(*m*) 2 Will. IV. c. 4, s. 4.

ART. 52.

Property belonging to Chelsea Hospital, how to be laid, &c.

It shall be sufficient in any indictment for any offence committed on or with respect to anything belonging to the Royal Hospital for soldiers at Chelsea, in the county of Middlesex, or the Commissioners thereof, to state any such property to belong to the Lords and other Commissioners of the Royal Hospital for soldiers at Chelsea, in the county of Middlesex; and it shall be sufficient in any indictment for any offence to which such form is applicable, to charge the same as being done with intent to defraud the Lords and others Commissioners of the Royal Hospital for soldiers at Chelsea, in the county of Middlesex. (*n*)

(*n*) See 7 Geo. IV. c. 16, s. 35.

ART. 53.

Form of indictment for a subsequent felony.

It shall be sufficient in any indictment for any felony not punishable with death, committed after a previous conviction for felony, and in any indictment for any misdemeanor against any Article of Chapter XVIII. of the Act of Crimes and Punishments, committed after a previous conviction for any misdemeanor against any Article of that Chapter, to state that the offender was, at a certain time and place, convicted of felony or misdemeanor respectively, without otherwise describing the previous felony or misdemeanor. (*o*)

(*o*) 7 and 8 Geo. IV. c. 28, s. 11, in part.

ART. 54.

Indictment against several.

An indictment against several defendants charging them jointly with any offence capable of being committed by a single offender, shall be deemed to be several as to each. (*p*)

(*p*) 2 Hale, 177; Bac. Ab. Misnomer G. Indictment G. 2; 4 T. R. 536.

ART. 55.

No more than one count in respect of one offence.

No indictment shall contain more than one count in respect of the same offence; but any person against whom, or whose property the offence charged has been committed, or whose description is involved in the statement of such offence, may be variously described in such count, in the alternative. (*q*)

(*q*) The object of repeating the description of the same transaction in different counts of an indictment is the avoiding of variances. But if, as suggested by us, forms of indictments following in most instances the language of the Article of the Act of Crimes and Punishments by which the offence charged is made punishable, with such a further detail of circumstances as is required by the Articles of this Section, were to be adopted, opportunities for variance would be rare. They would chiefly be confined to the circumstances of time and place, which are, in general, not deemed to be at all material by the present law, and to descriptions of persons and property. As regards these latter, it is essential that they should be proved as stated in the indictment, for two offences cannot be identical if the subject matter be different. It is from the condition imposed of inserting such descriptions, the particulars of which cannot be known with certainty, and which frequently cannot be proved upon the trial, that has arisen, as before mentioned, the troublesome and expensive practice of multiplying counts.

There are two methods by which the objects sought to be attained by a plurality of counts might be effected in a more unobjectionable manner: one of them would be to permit the use of alternative statements in the same count; the other would be to enlarge the powers of the judge, or judge and jury, in making amendments; giving at the same time the power of postponing the trial where any

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amendment might reasonably be deemed to have the effect of taking the accused by surprise. As regards the power of amendment, this is already given, so far as written instruments are concerned, by two statutes (9 Geo. IV. c. 15, and 11 and 12 Vic. c. 46, s. 4); but does not extend to Courts of quarter sessions.

It is proposed that the course of allowing alternative statements in the same count should be confined to the description of the person against whom or whose property the offence charged has been committed, or whose description is involved in the statement of such offence; but these are the most frequent grounds of multiplying counts according to the present practice. This course would not render indictments more vague than at present; but it would have the great advantage of simplifying and shortening them very materially. Whilst inconvenience results from having recourse to a multiplicity of counts for the purpose of avoiding an apprehended variance, nothing is gained from them with a view to real certainty. The multiplying formal and circumstantial descriptions does not make the charge in reality at all more certain, either in law or fact, than a single charge would have been, framed in terms sufficiently general to embrace all the variations of the charge. Though each distinct charge may appear to be more certain and precise, the accusation which the party is called upon to meet is not more certain. If, for instance, upon a charge founded on one transaction of taking a watch, an indictment contained three counts, one alleging a stealing of the watch of A, another alleging it to be the watch of B, and another stating it to be the property of C, the prisoner would only know that he was charged with stealing a watch, which it was proposed to prove to be the property either of A, *or* B, *or* C, and he would derive precisely the same information if the indictment contained but one charge of the taking of the watch, being the property of A, or B, or C. It is plain that the objection to alternative allegations, *viz.*, that the charge is uncertain, is not at all removed by substituting alternative counts for alternative allegations in the same count.

As regards the power of amendment, any objection on the ground of the purport of the indictment being a finding of the grand jury would apply to every species of amendment, and to many of the so-called immaterial variances, and is only of a technical nature; for there can be no substantial objection to exposing a person to take his trial when a grand jury have presented that they have found a *primâ facie* case against him of his having committed an offence within a particular Article of the Act of Crimes and Punishments, although the circumstances constituting him guilty of that same offence may differ in some respects from those of which the grand jury were cognizant; and it is always to be recollected that it is the protection of an accused from frivolous or malicious charges, which is the chief reason in the present day for insisting on the preliminary process of the indictment of a grand jury, rather than the expediency of such process with reference to the subsequent proceedings at the trial, or the subsequent use of the record.

The course of enlarging the powers of amendment has all the advantage of brevity over the practice of a plurality of counts which the course of allowing alternative statements would have; and would contribute to further brevity, by obviating the necessity, real or supposed, of multiplying indefinitely alternatives, either from excess of caution or from mercenary motives. It may be thought also that if alternatives were to be multiplied to a great extent, they would perplex an accused person instead of affording him information. Whereas in practice, were the statement of an offence confined to a single count, and were alternative statements prohibited, it would be seldom found that there would be any occasion to make amendments at all; and that where they might be required, there would be no room for reasonable doubt, whether the trial ought to proceed or to be postponed, and that the cases calling for a postponement of a trial would be very rare. And it is always to be recollected that any careless, and still more any apparently wilful, inaccuracy of statement in an indictment would not escape the animadversion of the Court.

The course of allowing amendments has a great advantage over the present practice in rendering the record useful for future purposes. The permission of alternative statements is open to the same objections as a plurality of counts in this respect. And the doctrine of immaterial variances which include discrepancies of time and place, materially diminish the utility of indictments for the purpose of recording judicial transactions. The more important variances of this description should be amended by the petit jury finding the facts in like manner as the grand jury had previously done. At present, upon a plea of a former conviction, or former acquittal, it may be necessary to discuss the numerous and sometimes uncertain points as to material and immaterial variances. The record, from its plausibly certain, but really indefinite, allegations, indicates that the accused might have been previously acquitted or convicted of any one of many offences, and it contains statements which may not be correct with reference to an offence of which the accused has been convicted.

Upon the whole, though the inclination of our opinion is in favour of allowing amendments, yet as the change would be a very great one, and as it did not meet with the approval of our late lamented colleague, Mr. Starkie, we have thought it safer to adopt the less violent alteration (which had his concurrence) of allowing alternative statements to the extent specified in the above Article. Should, however, the other course be thought preferable, the adoption of it would occasion very trifling alteration in the Articles of the Digest which we have submitted.

Art. 56.

Provided that, notwithstanding anything in the last preceding Article contained, it shall be lawful in any indictment for any treason against Article 1 of Section 3 of Chapter II. of the Act of Crimes and Punishments, or for any felony against Article ( ) (*r*) of the same Section, to charge against the offender any number of the matters, acts, or deeds by which such compassings, imaginations, inventions, devices, or intentions, as in those Articles respectively are mentioned, or any of them, shall have been expressed, uttered, or declared.

(*r*) See the 11 and 12 Vic., c. 12, s. 5, which Act reduces treason in compassing to levy war against the Queen, &c., to felony; but, having been passed since the making of the Report which contains the Act of Crimes and Punishments, contains no Article on the subject.

Art. 57.

Joinder of counts in

An indictment may contain several counts in respect of different offences; (*s*)

but the court may, in its discretion, put the prosecutor to his election as to which of them he will proceed upon at the trial.

respect of different offences.

(*s*) By the present law the offences must be of the same degree; but it has been decided that where they are so, it is no objection to their joinder that the penalty for one is positive, that of another discretionary. (See 4 East, 174; East's P. C. 408, 409, 410; 2 Mau. and Sel. 533; 1 Chitty's C. L., 155.) It is the practice, however, of judges, which may be considered equivalent to a general law on the subject, to limit a trial where the indictment charges more felonies than one to a single felony, allowing the prosecutor, where he is capable of electing, the right of electing for which of those charged he will proceed. In one instance, however, of recent enactment, counts for distinct felonies are allowed to be joined in the same indictment, and the prosecutor is not to be put to his election, viz., in the case of the joinder of a count for stealing and one for receiving, by the Act of last session (11 and 12 Vict. c. 46, s. 3). So in certain cases of embezzlement, any number of acts of embezzlement not exceeding three, if committed within six calendar months from the first to the last of such acts, may be charged in the same indictment (see 7 and 8 Geo. IV. c. 29, s. 48; 2 Will. IV. c. 4, s. 3). In misdemeanors, however, it is in no case usual so to confine a prosecution. Hence it is the ordinary course not to charge more than one distinct felony in an indictment, but to charge as many misdemeanors as the occasion requires.

The reason for prohibiting the junction of charges for offences of different degrees in the same indictment was grounded on the different forms of trial in such cases. This reason of different forms of trial in the cases of felonies and misdemeanors now no longer operates; and, moreover, many offences which were formerly felonies will now be classed as misdemeanors.

But it is manifest that the accumulation of various charges in the same indictment might often protract trials to an inconvenient length, and might perplex the accused in making his defence; whilst, on the other hand, it may in some instances be very convenient that charges for different offences should be joined, especially where in reality only one offence has been committed, but it may be doubtful which of two similar offences that is, or where a repetition of similar offences has been committed.

It seems expedient to permit generally the joinder of counts for different offences of a less degree than treason, but to give the judge (except in those cases where it is already taken away) a discretion of striking out all the counts but one, or so many counts as he thinks ought more properly be matter for a separate indictment or separate indictments.

Art. 58.

An indictment may also contain several counts in respect of different offences against several persons. (*t*)

Several offences may be charged in same indictment.

(*t*) 8 East, 47; Com. Dig. "Indictment F.;" Bac. Abrid. "Indictment G;" 2 Hale, 174; 2 Roll. R. 345.

Art. 59.

Provided that notwithstanding anything in the last two preceding Articles contained, a count for treason is not to be joined with a count for felony or misdemeanor.

Treason not to be joined with felony or misdemeanor.

Art. 60.

Provided also that where a count for stealing anything is joined in the same indictment with a count for receiving or having in possession or keeping the same thing, knowing it to have been stolen, the prosecutor shall not be put to his election, as in Article 57 of this Section is mentioned. (*u*).

Counts for theft and receiving.

(*u*) 11 and 12 Vic. c. 46, s. 3.

Art. 61.

Provided also that where in any indictment against any person for any offence against Article 7 of Section 3 of Chapter XVIII., of the Act of Crimes and Punishments, there shall be joined any number of counts not exceeding three, in each of which a distinct act of embezzlement, committed by him against the same master within a period not exceeding six calendar months from the first to the last of such acts shall be charged; or where, in any indictment against any person for any offence against Article 1 of Section 1 of Chapter VIII., of the Act of Crimes and Punishments, there shall be joined any number of counts not exceeding three, in each of which a distinct act of embezzlement or of fraudulent application or disposition, committed by him within a period not exceeding six calendar months from the first to the last of such acts shall be charged; the prosecutor shall not be put to his election as in Article 57 of this Section is mentioned. (*w*).

Counts for any number of acts of embezzlement not exceeding three committed within six months.

(*w*) See 7 and 8 Geo. IV. c. 29, s. 48; 2 Will. IV. c. 4, s. 3.

Art. 62.

If an indictment already found be defective, another may be preferred and found, on which the Court will, at discretion, and upon imposing such terms as may seem to be just, quash the first indictment. (*x*).

Defective indictment.

(*x*) R. *v.* Stowell, 1 Dowl. N. S. 320; Corner's P. 165.

Chap. II. Sec. 3.

SECTION 3.

Of the Caption of an Indictment.

ART. 1.

Definition.

THE caption of an indictment is a formal statement of the court before which an indictment is found, of the time when and place where it is found, and of the jurors by whom it is found. (*a*)

(*a*) Bac. Ab. "Caption."

ART. 2.

Requisites.

The caption must state the name of the county or other district within which the jurors have jurisdiction to inquire. (*b*)

(*b*) 2 Hale's P. C. 165, 166.

ART. 3.

It must also state the court before which the indictment was found in plain and distinct terms. (*c*)

(*c*) 2 Hale's P. C. 166; Haw. P. C. b. 2, c 25.

ART. 4.

It must also state the place where the court was held, so as to show with certainty that the indictment was found at a place within the jurisdiction of the court. (*d*)

(*d*) 2 Hale's P. C. 166; Haw. P. C. b. 2, c. 25, s. 128; Bac. Ab. Indt. I.

ART. 5.

Provided that if the county or other district within which such place as in the last preceding Article is mentioned is situated has been named in the margin of the caption, such county or district may be stated by reference to the county or district mentioned in the margin, and it shall not be necessary to repeat it in the body of the caption. (*e*)

(*e*) 2 Hale's P. C. 180; 3 P. W. 439; Cro. Eliz. 137, 606—738.

ART. 6.

The caption must also state the time at which the indictment was found distinctly and without repugnancy or contradiction. (*f*)

(*f*) Bac. Ab. Indt. I.

ART. 7.

Where the indictment was found on a day on which the court was held by adjournment, the caption must show that fact and when the original session of the court was held. (*g*)

(*g*) Str. 865; R. *v.* Bowman, 6 Car. and Payne, 337.

ART. 8.

But it shall not be necessary to set forth the authority for holding the court, where it is exercised in the course of its ordinary jurisdiction. (*h*)

(*h*) 4 Burr. 2085.

ART. 9.

The caption must also state the names of so many of the judges, justices, or other judicial officers forming the court as suffice for the due taking of the indictment. (*i*) If the court consisted of more than suffice for that purpose, the rest may be described as others their fellows, without specifying their names.

(*i*) Cro. Eliz. 738; 1 Chitty's C. L. 331.

ART. 10.

The caption must also state the character or capacity in which judges, justices, or other judicial officers take the indictment. (*k*)

(*k*) 2 Hale's P. C. 166. As that they are justices of the peace, justices of gaol delivery assigned to deliver the gaol, &c., otherwise it would not appear that they had authority to take the indictment.

ART. 11.

As regards the rule contained in the last preceding Article, the caption will be sufficient if it show that the persons named had authority to take an indictment for the particular offence, although the whole of their authority be not stated.

ART. 12.

But it is not essential that the caption should state that any of the judges, justices, or other judicial officers named in it was of the quorum. (*l*)

(*l*) 2 Hale's P. C. 166; Haw. P. C. b. 2, c. 25, s. 122; 4 Burr. 2084. It has been held to be otherwise where a statute expressly requires that one of two justices shall be of the quorum, 2 Hale's P. C. 167. It seems, however, to be desirable to have one general simple rule.

ART. 13.

The caption must also show that the jurors were of the county or district for which the Court had jurisdiction to inquire, that they were sworn and charged to inquire for the body of such county or district, that they made their presentment on oath (*m*), and that the bill of indictment was found by 12 jurors at the least. (*n*)

(*m*) 2 Hale's P. C. 167; Haw. P. C. b. 2, c. 25, s. 16—126; Cro. Eliz. 677; Bac. Abrid. Indt. I., and see Art. 7 of Section 1 of Chapter XII. of this Act.

(*n*) 2 Hale's P. C. 167; Haw. P. C. b. 2, c. 25, s. 16; 4 East, 175, 176; 1 Saund. 248, n. 1; Cro. Eliz. 654.

ART. 14.

But the caption need not state the names of the persons on whose oath the indictment was found (*o*); except where returned together with the indictment into the Court of Queen's Bench in pursuance of a writ of *certiorari*. (*p*)

(*o*) 1 Saund. 248, n. 1, 249, n. 1; 2 Str. 702; 4 East, 174; Andr. 143.

(*p*) 2 Hale's P. C. 167; 1 Saund. 248, n. 1; Hawk. P. C. b. 2, c. 25, s. 126.

SECTION 4.

Of Criminal Informations.

ART. 1.

A CRIMINAL information in the name of the Queen is a suggestion filed on record by the Queen's Attorney-General, or by Her Coroner or Master of the Crown Office in the Court of Queen's Bench, that a misdemeanor has been committed by an alleged offender. Definition.

ART. 2.

It is competent to the Attorney-General, at his discretion, to file a criminal information. (*a*) Informations filed by the Attorney-General.

(*a*) 11 Harg. Stat. Tri. 270; 4 Black. Com. 312. Bac. Ab. Information A.

ART. 3.

The Court will not, even upon the application of the Attorney-General (*b*) quash a criminal information filed by him. (*c*)

(*b*) Doug. 239.

(*c*) Com. Dig. Information D. 4; Bac. Ab. Informations A.; 1 Salk, 372; 1 Chitty's C. L. 847. But see 1 Sid. 152.

ART. 4.

The Attorney-General may enter a *nolle prosequi* to a criminal information, and file another. (*d*)

(*d*) Doug. 239; 1 Chitty's C. L. 847.

ART. 5.

Whatever may be done as regards criminal informations by the Attorney-General may, during vacancy in that office, be done by the Solicitor-General. (*e*)

(*e*) 4 Burr. 2553; 4 Bro. P. C. 360. It has been said that in case of the illness of the Attorney-General, or his being interested in the subject matter, or other sufficient reason, the King might appoint any other to sue for justice in his name, 4 Burr. 2554. As no instance appears in which it has been necessary to resort to such a power, it does not appear to be desirable to introduce any Article in furtherance of the assertion.

ART. 6.

It is not competent to Her Majesty's Coroner or Master of the Crown Office in the Court of Queen's Bench to exhibit, receive, or file a criminal information without the express order of that court, given in open court, first obtained, on motion made, grounded on proper affidavits. (*f*) Information filed by the Master of the Crown Office.

(*f*) See 4 and 5 Will. and Mary, c. 18, s. 2 and 6; 1 Chitty's C. L. 849.

Chap. II. Sec. 4.

ART. 7.

It is in the discretion of the Court of Queen's Bench, in granting leave to file a criminal information, to impose upon the applicant the condition of agreeing to suspend or forego his remedy by action in respect of the same grievance, or such other condition as may seem to be just; and also, in refusing leave to file such information, to impose on the party moved against the condition of paying the applicant's costs, or such other condition as may seem to be just. (*g*)

(*g*) Haw. P. C. b. 2, c. 26, s. 8; 2 T. R. 198; 2 Burr. 830, 719; Rep. temp. Hardw. 241.

ART. 8.

Leave will not be granted to file a criminal information unless the application be made under such circumstances and at such early period as are prescribed by the discretionary rules of the court. (*h*)

(*h*) As such rules are merely discretionary, and are subject to many exceptions, also discretionary, they do not conveniently admit of restraint by any precise rule. The same observation also applies to many other discretionary rules by which the court are usually guided, but which are subject to exceptions, and are not binding on the court. For this reason we have not thought it proper to found Articles upon these rules, and have omitted Articles 9, 10, 11, 12, and 13 of Section 4 of Chapter II. of the Act of Procedure, as they were only inserted by the Criminal Law Commissioners by way of example. Those Articles are as follows:—

"ART. 9.

"It is a discretionary rule of the court not to grant leave to file a criminal information against a "magistrate in respect of official misconduct, where he appears to have acted with pure and upright "intentions. [See 2 Burr. 719, 722, 1162; 1 Chitty's C. L. 875; Haw. P. C. b. 2, c. 26, s. 9; "1 Bl. R. 422; 2 Strange, 1182.]

"It is also a discretionary rule of the same court not to grant such leave on an application made so "late in term that cause cannot be shown before the next term in respect of misconduct alleged to have "taken place before the commencement of the term, or to grant such leave where two terms have inter- "vened since such alleged misconduct, nor so late in the second term as to exclude the showing of cause "before its conclusion. [13 East, 322.]"

"ART. 10.

Information against magistrates.

"Six days' notice, at least, is required to be given to a magistrate of an intended application for a "criminal information against him,* for any misconduct in his magisterial capacity.†

"* Corner's Forms, 117; 2 Ad. and Ell. 127.

"† R. *v.* Heming, 2 N. and M. 477; 5 Barn. and Adol. 666.

"ART. 11.

"Such notice may be signed either by the party at whose instance the application is to be made "(being a party aggrieved), or by his attorney, stating himself to be the attorney of such party.‡

"‡ See Corner's Forms, 117.

"ART. 12.

"It must contain a distinct statement of the grievances or acts of misconduct complained of, and "must be served six days before the time stated in it for making the application.§

"§ Corner's P. 169; R. *v.* Fenham, 2 A. and E. 127.

"ART. 13.

"Such notice does not require personal service,‖ but may be left at the magistrate's usual place of "abode.¶"

"‖ Corner's P. 170.

"¶ 1 Chitty's C. L. 876; 2 Barnard. 284; 4 T. R. 465."

ART. 9.

Rules as to the description of the offence.

All the rules relating to the description of the offence in the case of indictments are applicable to criminal informations. (*i*)

(*i*) 4 Burr. 2556; Haw. P. C. b. 2, c. 26, s. 4; Bac. Ab. Informations; 1 Chitty's C. L. 864.

ART. 10.

Customs.

Criminal informations exhibited for any offence against any Article of the Act of Crimes and Punishments relating to the Customs in any of Her Majesty's Courts of Record at Westminster, must be had or exhibited within three years next after the date of the offence committed. (*k*)

(*k*) 8 and 9 Vic., c. 87, s. 134, in part.

ART. 11.

Definition of "Information."

The term "information," wheresoever used in any other Section of this Act to signify the mode of prosecution, shall be deemed to signify a criminal information within the meaning of this Section.

CHAPTER III.

Proceedings after an Indictment found or Information filed to compel Appearance to Answer.

SECTION 1.

What manner of Appearance sufficient.

Art. 1.

A party against whom an indictment has been found in the Court of Queen's Bench, for treason or felony, must, except by leave of the Court, (*a*) appear in person. (*b*)

(*a*) R. *v.* Blackburne and others, 4 B. and A. 575.
(*b*) Corner's P. 125, 130.

Art. 2.

A party against whom an indictment has been found or information filed in the Court of Queen's Bench for a misdemeanor may appear either in person or by attorney. (*c*)

(*c*) Corner's P. 125.

Art. 3.

A party against whom an indictment has been found in any Court of oyer and terminer, or of sessions of the peace, for any crime must appear there in person. (*d*)

(*d*) 1 Chitty's C. L. 86, 411; 4 Black. Comm. 351.

Art. 4.

Where an indictment has been found in any Court against the inhabitants of any local district, they must appear by two of their number. (*e*)

(*e*) 1 Chitty's C. L. 472.

Art. 5.

Where an indictment has been found in any Court against a corporation aggregate, or against an incorporated company, it must appear by attorney. (*f*)

(*f*) R. *v.* Birmingham and Gloucester R. Comp. 3 Q. B. R. 223; and therefore, if such a Company, not being authorized by their Act of Incorporation to appoint an attorney, be indicted, the proper course is to remove the indictment by *certiorari* into the Q. B. where they must in all cases appear by attorney. See Corner's P. 53.

SECTION 2.

Process after an Indictment found or Information filed.

Art. 1.

Process.

If an indictment be found or information filed against a person who is not already either in actual custody or under recognizance to appear and answer; or who, being under such recognizance, makes default, his appearance to answer may be compelled either by writ or warrant (*a*) in manner hereinafter in this Section mentioned: Provided that no such writ or warrant shall be issued during any assizes or sessions of the peace at which such person is under recognizance to appear to answer such indictment or information. (*b*)

(*a*) By the present law besides the proceeding by writ or warrant when a criminal information has been filed, the party informed against may be compelled to answer by a writ of *subpœna*; but it appears to us to be unnecessary to give this additional means of enforcing appearance in the case of an information; it only renders the law complicated, and if not required in the case of indictments, the ordinary mode of charging a party criminally, it cannot be wanted in the case of informations the object of which is precisely the same, but which are, comparatively speaking, seldom used. We have, therefore, omitted the Articles of the Act of Procedure which relate to the mode of proceeding by *subpœna*, attachment, &c. The following are those Articles, Chap. III. Sect. 5 :—

" Art. 8.

" If the party informed against be not under terms to appear, a writ of *subpœna* may be issued to " compel him to answer.*

" * Corner's P. 174.

" Art. 9.

" In case the party charged do not appear, according to the course and practice of the court, after " the return of the subpœna, a writ of attachment is issuable for arresting the party, according to such " course and practice.†

" † Corner's P. 175.

Chap. III. Sec. 2.

" Art. 10.

" If the party appear, a writ of *supersedeas* to the attachment issues, on which, if he has been com-
" mitted, he may be discharged out of custody; and if he has been committed to the Queen's prison
" on such attachment, he may be discharged by order of a judge on a certificate by a master on the
" Crown side of the court that an appearance has been entered, on payment of costs. ‡

" ‡ Corner's P. 41.

" Art. 11.

" If the party be committed on the attachment to the prison of the Queen's Bench, further proceedings against him are [by *habeas corpus* to bring him into Court to plead to the information].§

" § Corner's P. 24. The words between brackets have been inserted upon the authority of Mr. Jones, Master of the Crown Side of the Court of Queen's Bench. As the Article stood in the Eighth Report of the Criminal Law Commissioners, such further proceedings were stated to be as in ordinary cases of attachment for contempts.

" Art. 12.

" Where a party is in prison, or comes in on a *cepi corpus*, or proceeding to outlawry on attachment,
" he is bound to plead immediately. ‖

" ‖ 2 Salk, 514. Com. Dig. Information, D. 5."

It may, perhaps, also be considered, that after an indictment found, one process alone for compelling appearance ought to suffice; and that, by the allowing of the two processes of writ and warrant, unnecessary perplexity is introduced into the law of procedure. But it is to be observed, that the proceeding by warrant is inapplicable to process against incorporated Companies and inhabitants of local districts, and does not seem well adapted to the formalities which may be thought desirable preparatory to a declaration of outlawry.

(*b*) The defendant has the whole term for making his appearance, 2 Salk. 607; 1 Chitty's C. L. 342; but the prosecutor having procured a warrant during the assizes or sessions, may issue it on the close of such assizes or sessions.—*Ib.*

Art. 2.

Information by Master of the Crown Office.

Provided also that Her Majesty's Coroner or Master of the Crown Office in the Court of Queen's Bench shall not issue out any process upon a criminal information, filed under the provisions of Article 6 of Section 4 of Chap. II. of this Act, before he shall have taken or shall have delivered to him a recognizance from the person procuring such information to be exhibited, with the place of his abode, title or profession, to be entered to the person against whom such information is to be exhibited, in the penalty of twenty pounds, that he will effectually prosecute such information, and abide by and observe such orders as the Court of Queen's Bench shall direct, which recognizance such Master of the Crown Office, and also every justice of the peace for any county, city, franchise, or town corporate (where the cause of any such information shall arise), are empowered to take; after the taking whereof by such Master, or the receipt thereof from such justice of the peace, such Master shall make an entry thereof upon record, and shall file a memorandum thereof in some public place in his office, that all persons may resort thereunto without fee. (*c*)

(*c*) See 4 and 5 Will. and Mary, c. 18, ss. 2 and 6.

Art. 3.

Venire.

Upon an indictment found or information filed against any person for a misdemeanor, a writ of *venire facias ad respondendum* directed to the sheriff of any (*d*) county in which such person is supposed to be may be issued from the Court of Queen's Bench, or from any Court of oyer and terminer or session of the peace respectively having jurisdiction in the particular case. (*e*)

(*d*) As to the power of justices of oyer and terminer to direct their writs into any county, see 5 Edw. III. c. 11. Justices of the peace at quarter sessions also have this power on indictments for the non-repair of bridges, 22 Hen. VIII. c. 5, s. 5, and the like power by other statutes in many other cases, Haw. P. C. b. 2, c. 27, s. 4: there seems therefore to be no reason why it should not be exercised generally.

(*e*) Every Court authorized to hear and determine in criminal pleas is authorized to issue process of arrest on an indictment found, Com. Dig. Process, A. 1; 1 Chitty, C. L. 338; Dalt. J. 193; 5 Ed. III. c. 11; 1 Ed. IV. c. 1. It is otherwise under a mere commission of gaol delivery, 2 Hale, 198.

Art. 4.

Distringas.

If such person as in the last preceding Article is mentioned after being duly served with a writ of *venire* make default in appearing thereto within the time limited by the rules of the Court from which the same has issued, a writ of *distringas* is issuable from time to time, till he do appear; and by force thereof the sheriff shall on every default, levy such issues as shall be according to the course and practice of the Court. (*f*)

(*f*) Hawk. P. C. b. 2, c. 27, s. 10; Corner's P. 128.

ART. 5.

Appearance in Queen's Bench.

A person summoned on a writ of *venire facias ad respondendum* from the Court of Queen's Bench may in person or by his attorney cause an appearance to be entered at the Crown Office; and a writ of *supersedeas* may be issued to the *distringas* if necessary, either to stay the execution of the writ, or to procure the return of the amount levied. (*g*)

(*g*) See 10 East, 83; 2 Stra. 1101, 816; 1 Ch. C. L. 411, 447; 6 Mod. 16; Bac. Ab. "Attorney," B.; 4 and 5 Will. and Mary, 18.

ART. 6.

Capias.

If such person as in Article 3 of this Section is mentioned, after being duly served with a writ of *distringas*, make default in appearing thereto within the time limited by the rules of the Court from which such process has issued, and if it appear by the return to such writ of *distringas* that he have no lands or goods in the county whereby he can be distrained, then except in proceedings against a peer, corporation, or the inhabitants of a county, parish, or other district, a writ of *capias ad respondendum* may be issued. (*h*)

(*h*) 4 T. R. 521, 694, 506; 2 H. B. 419; 4 Black. Comm. 319; 1 Chitt. C. L. 339; Steph. C. L. 272; Corner's P. 129.

ART. 7.

In case of felony.

Upon an indictment for treason or felony, a writ of *capias ad respondendum* is issuable in the first instance in all cases.

ART. 8.

Alias and *pluries capias.*

On the return of *non inventus* to a *capias*, an *alias* writ, and afterwards a *pluries* writ is issuable as occasion may require.

ART. 9.

Return of writs.

The writs hereinbefore in this Section mentioned shall be tested and made returnable according to the course and practice of the Court from which they issue.

ART. 10.

Party taken, where to be imprisoned.

Where a person has been arrested on a *capias ad respondendum*, he is to be taken to the county gaol.

ART. 11.

Where a person against whom an indictment has been found for felony, or against whom an indictment has been found, or information filed for any of the misdemeanors specified in Article 18 of Section 5 of Chapter I. of this Act, (*i*), has been taken to the county gaol as in the last preceding Article is mentioned, he may be discharged out of such custody by leave of the Court of Queen's Bench or of a judge thereof, in whose discretion it is to grant or refuse the same, on giving bail for his appearance to answer such indictment or information.

(*i*) See the note to that Article *ante:* we think that these misdemeanours should be put upon the same footing as felonies in all cases, as regards bail. This and the next three Articles have been framed with the assistance of Mr. Jones, Master of the Crown Side of the Court of Queen's Bench.

ART. 12.

Where a person against whom an indictment has been found or information filed for any other misdemeanor than those referred to in the last preceding Article, has been taken to the county gaol as in Article 10 of this Section is mentioned, he is entitled to be discharged out of such custody, on giving bail before a judge of the Court of Queen's Bench, or before a justice of the peace for the county in which he is imprisoned, for his appearance to answer such indictment or information.

ART. 13.

Where such person as in the last preceding Article is mentioned has been arrested on a writ of *capias ad respondendum* from the Court of Queen's Bench, he is entitled to be discharged out of custody on causing an appearance to be entered at the Crown Office.

ART. 14.

Where a person against whom any indictment has been found or information, filed has been taken to the county gaol as in Article 10 of this Section is mentioned,

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he may, subject to the rules hereinafter in Section 2 of Chapter XI. of this Act contained, cause himself to be brought up by writ of *habeas corpus* before the Court of Queen's Bench or a judge thereof, for the purpose of giving bail for his appearance to answer such indictment or information, as in Articles 11 and 12 of this Section mentioned.

ART. 15.

The Court of Queen's Bench, or a judge thereof, has also a discretionary power, on just cause shown, of directing any such person so taken to the common gaol, as in Article 10 of this Section is mentioned, to be admitted to bail before a justice of the peace for the county in which he is imprisoned.

ART. 16.

Warrant by Judge of Queen's Bench on certificate of indictment or information in Queen's Bench.

Upon an indictment found in the Court of Queen's Bench against any person for a misdemeanor, any judge of such Court may, upon a certificate of that fact, issue his warrant, signed by and under the seal of such judge, and thereby cause such person to be apprehended and brought before him or some other judge of that Court, or before a justice of the peace, in order to his being bound to the Queen with two sufficient sureties in such sum as in such warrant shall be expressed, with condition to appear in such Court within the first eight days of the ensuing term, and to plead to the indictment and try the same at the Sittings of Nisi Prius to be holden after the same term in and for the county of Middlesex, and personally to appear on the return of the postea in case he shall be convicted, and so from day to day, and not to depart the Court without leave; and upon an information filed in the same Court, the like warrant (except as regards the condition) may be obtained on certificate, supported by affidavit, stating some special reason for departing from the ordinary course of proceeding by writ, and the condition of such last-mentioned warrant will be that the defendant shall appear at the time mentioned in such warrant, and shall answer to all and singular informations according to the course of the Court, and not depart the Court without leave. (*k*)

(*k*) See the 48 Geo. III. c. 58, s. 1, in part. This Article has been framed with the assistance of Mr. Jones, Master of the Crown Side of the Court of Queen's Bench.

ART. 17.

Provided, that where the misdemeanor in respect of which any person shall be so brought before any judge of the Queen's Bench, or justice of the peace, as in the last preceding Article is mentioned, shall be any of those specified in Article 18 of Section 5 of Chapter I. of this Act, it shall be in the discretion of such judge or justice either to admit such person to bail in manner in such last preceding Article mentioned, or to commit him to such common gaol as in that Article is mentioned, there to remain until he be thence delivered by due course of law.

ART. 18.

In case any person who shall be apprehended as in Article 16 of this Section is mentioned, shall neglect or refuse to become so bound as therein is mentioned, it shall be lawful for the judge or justice before whom such person shall be brought to commit such person to the Queen's Prison or to the common gaol of the county, city, or place where the offence shall have been committed, or where he shall have been apprehended, there to remain until he shall become so bound, or shall be discharged by order of the Court of Queen's Bench in term time, or of one of the judges of such Court in vacation or otherwise by due course of law: and the recognizance to be therefore taken shall be returned and filed in such Court, and shall continue in force until such person shall have been acquitted of such offence, or, in case of conviction, shall have received judgment for the same, unless sooner ordered by such Court to be discharged. (*l*)

(*l*) 48 Geo. III. c. 58, s. 1, in part. The preamble to this Act recites that the 26 Geo. III. c. 77, s. 18, and 35 Geo. III. c. 96, relating to the public revenue had been found beneficial, and that it was expedient to extend the same to other cases. It is remarkable that the same provision (as regards offences against the revenue) is contained in the statute 3 and 4 Wm. IV. c. 53, s. 108.

ART. 19.

To whom to be directed.

The warrant mentioned in Article 16 of this Section is to be directed to the judge's tipstaff, all chief and petty constables, headboroughs, tithingmen, and all

others whom it may concern. Where there are several defendants, a separate warrant may be had against each, or they may all be included in one warrant. (*m*)

(*m*) Corner's, p. 124.

ART. 20

Rules as to bail.

The like rules, as regards the sufficiency and amount of bail, apply in cases where a person is arrested under a writ of *capias ad respondendum*, or under any such warrant as is mentioned in Article 16 of this Section, as would have been applicable had he been taken under any such warrant as is mentioned in Section 1 of Chapter I. of this Act.

ART. 21.

Notice of bail to be given.

The Court of Queen's Bench, or a judge thereof, or a justice of the peace, before admitting a person to bail under the provisions of any of the preceding Articles of this Section, will require 48 hours' notice to have been given to the prosecutor of the names and additions of the bail, and when and where and before whom the bail was intended to be put in. (*n*)

(*n*) Corner's P. 124, 175; 1 Chitty's C. L. 344. By the statute 30 Geo. II. c. 24, s. 17, no person charged on oath with an offence under that Act, viz., obtaining money by false pretences, &c., and which shall require bail, shall be admitted to bail unless 24 hours' notice at least shall be proved by oath to have been given in writing to the prosecutor of the names and places of abode of the persons proposed to be bail for such offender, unless the bail offered shall be known to the justice or justices, and he or they shall approve of them.

ART. 22.

In cases of common assault.

Provided, that in cases of common assault no notice of bail shall be necessary, notwithstanding anything in the last preceding Article contained. (*o*)

(*o*) Corner's, P. 124.

ART. 23.

Bench warrant.

Upon an indictment found in any court against any person, who shall then be at large, and shall not have been bound by any recognizance to appear to answer the same, such Court may forthwith issue a Bench warrant (to be executed within the limits of its jurisdiction) for apprehending such person and bringing him before such Court, if it shall be then sitting, to answer such indictment; or if such Court shall not be then sitting, before any justice of the peace for the county, riding, division, liberty, city, borough, or place where such person shall be apprehended, in order to his commitment, or giving bail in manner hereinbefore in Section 5 of Chapter I. of this Act mentioned.

ART. 24.

Process, how to be tested.

All manner of process upon any indictment, although the same be issued in any county palatine or other liberty, shall be made only in the name of the Queen; and every person or persons having such county palatine or other such liberty to make such process, shall make the teste in the name of the person or persons that hath or have such county palatine or liberty. (*p*)

(*p*) See the 27 Hen. VIII. c. 24.

ART. 25.

All such process as in the last preceding Article is mentioned, if issued from the Court of Queen's Bench, is to be tested by the chief justice of that Court, or during vacancy, by the senior judge thereof; if issued from a Court of session of the peace, is to be tested by a justice of the peace sitting in Court; (*q*) and if issued from any other Court, is to be tested by the first in the commission under which such Court is held. (*r*)

(*q*) According to Haw. P. C. b. 2, c. 27, s. 8, it is sufficient that the indictment be tested by one justice.

(*r*) 1 Haw. P. C. b. 2, c. 27, s. 8.

ART. 26.

Service of process out of England.

Provisions concerning the service of process on persons in any part of the United Kingdom out of England, requiring the appearance of such persons to answer in any criminal prosecution in England, are contained in Articles 39 and 40 of Section 1 of Chapter II. of this Act.

ART. 27.

Warrant on certificate of indictment found at assizes or sessions.

Upon an indictment found in any court of oyer and terminer or general gaol delivery, or in any court of general or quarter sessions of the peace against any person who shall then be at large, and whether such person shall have been

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bound by any recognizance to appear to answer the same or not, the person who shall act as clerk of the indictments at such court of oyer and terminer or gaol delivery, or as clerk of the peace at such sessions at which such indictment shall be found, shall at any time afterwards after the end of the sessions of oyer and terminer or gaol delivery, or sessions of the peace at which such indictment shall have been found, upon application of the prosecutor or of any person on his behalf, and on payment of a fee of one shilling, if such person shall not have already appeared and pleaded to such indictment, grant unto such prosecutor or person a certificate (R) of such indictment having been found; and upon production of such certificate to any justice of the peace for any county, riding, division, liberty, city, borough or place in which the offence shall in such indictment be alleged to have been committed, or in which the person indicted in and by such indictment shall reside or be, or be supposed or suspected to reside or be, it shall be lawful for such justice, and he is hereby required to issue his warrant (S) to apprehend such person so indicted, and to cause him to be brought before such justice or any other justice for the same county, riding, division, liberty, city, borough or place, to be dealt with according to law; and afterwards if such person be thereupon apprehended and brought before any such justice, upon its being proved upon oath before him that the person so apprehended is the same person who is charged and named in such indictment, shall, without further inquiry or examination, commit (T) him for trial or admit him to bail in manner in Section 5 of Chapter I. of this Act mentioned; or if such person so indicted shall be confined in any gaol or prison for any other offence than that charged in such indictment at the time of such application and production of such certificate to any such justice as hereinbefore in this Article is mentioned, it shall be lawful for such justice, and he is hereby required, upon its being proved before him upon oath that the person so indicted and the person so confined in prison are one and the same person, to issue his warrant (U), directed to the gaolor or keeper of the gaol or prison in which the person so indicted shall then be so confined, commanding him to detain such person in his custody until by Her Majesty's writ of *habeas corpus* he shall be removed therefrom, for the purpose of being tried upon such indictment, or until he shall otherwise be removed or discharged out of his custody by due course of law. (*s*)

(*s*) 11 & 12 Vic. c. 42. s. 3.

ART. 28.

Form and execution of warrant.

Unless it be otherwise specially provided, the like rules as regards the form of warrants, the persons by whom and the places where to be executed, and the powers, protection, and indemnification of the persons by whom writs of *capias ad respondendum* and warrants are to be executed, apply, so far as the same are applicable, in the cases respectively of writs of *capias ad respondendum* and of warrants issued after an indictment found, or information filed, as are applicable to warrants issued before an indictment found or information filed. (*t*)

(*t*) It seems to be doubtful whether, on any *capias ad respondendum*, outer doors may not be broken; but we think that it would be better to restrict the rule to breaches of the peace, as is done by Foster, J. 2 Disc. on Homicide, 320, and see 5 Co. 91; Fitz. Tresp. 232; Burn's Just. 248.

ART. 29.

Supersedeas.

Where a person against whom an indictment has been found or information filed is desirous of preventing his apprehension under a writ of *capias ad respondendum* or a warrant, he may procure a certificate of such indictment having been found or information filed, from the person who shall act as clerk of the indictments in the case of an indictment found at a court of oyer and terminer or general gaol delivery,—and from the person who shall act as clerk of the peace in the case of an indictment found at any court of general or quarter sessions of the peace; and upon the production of such certificate to any justice of the peace having authority under any of the foregoing Articles of this Section, to bail such person when apprehended and brought before him on a writ of *capias* or warrant, such justice may admit him to bail or commit him for trial in the same manner as he might have done had such person been so apprehended and brought before him; and where he admits him to bail, shall grant him a writ of *supersedeas* to protect him from any writ of *capias* or warrant which may have been or may be issued against him upon such indictment or information. (*u*)

(*u*) Dalt. 193; Chitty's Burn's Just. tit. "Process:" Corner's P. 125.

ART. 30.

Leave to enter appearance, &c., where party under terms to appear to a criminal information immediately.

Where a rule to show cause why a criminal information should not be filed against a person has been enlarged by the Court of Queen's Bench, upon condition that such person, in case such Court should grant leave to file such information, should appear and plead thereto within a time limited by such Court, it shall be lawful for such Court, if he do not so appear and plead within the time so limited, after notice that such information has been filed, to allow an appearance to be entered for him, and judgment to be signed for want of a plea, or, in case he shall have been served personally with such notice, to issue an attachment against him, whereupon such further proceedings shall he had against him as in ordinary cases of attachment for contempt. (*x*)

(*x*) Corner's P. 174; Archbold's Crown Off. Pr. 45.

ART. 31.

Process where indictments for offences in towns corporate preferred in next adjoining county.

Whensoever, in pursuance of Article 23 of Section 1 of Chapter II. of this Act, any bill of indictment shall be found by such grand jury as therein is mentioned against any person for any offence committed or charged to be committed within the county of any city or town corporate, the Court of oyer and terminer or general gaol delivery of the next adjoining county before which such bill of indictment shall be found, may issue process for apprehending any person against whom such bill shall be so found, if not in custody, in like manner as in cases of indictments found in any such Court for offences committed within any such adjoining county. (*y*)

(*y*) 38 Geo. III. c 52, s. 4, in part.

SECTION 3.

Process on Removal of an Indictment by Certiorari.

ART. 1.

Process by writ.

WHERE an indictment has been removed into the Court of Queen's Bench by writ of *certiorari* as hereinafter in Section 1 of Chapter XI. of this Act is mentioned, and the person indicted is not in actual custody, his appearance in that Court to plead to such indictment may be compelled by writ in the same manner as upon an indictment found in that Court.

ART. 2.

By warrant.

So also, upon a certificate from the Crown Office, that an indictment for a misdemeanor has been removed into and filed in the Court of Queen's Bench, and that the person indicted has not appeared in that Court, nor any recognizance for his appearance to answer been filed, or, if the indictment has not been returned in obedience to the writ of *certiorari*, upon a certificate from the clerk of assize, clerk of the peace or other proper office that such indictment has been found, and a certificate from the Crown Office that such writ of *certiorari* has been issued, and that the person indicted has neither appeared nor any recognizance been filed as before mentioned, supported in either case by affidavit stating some special reason for departing from the ordinary course of proceeding by writ, any judge of the Court of Queen's Bench may issue a warrant, signed by and under the seal of such judge, and thereby cause such person to be apprehended and brought before him or some other judge of that Court, or before a justice of the peace in order to his being bound to the Queen with two sufficient sureties in such sum as in such warrant shall be expressed, with condition to appear in such Court at the time mentioned in such warrant, and to answer the indictment according to the course of the Court. (*a*)

(*a*) See Corner's P. 127, and Form xci.

ART. 3.

The several rules contained in Articles 18 and 19 of the last preceding Section shall respectively apply to persons neglecting or refusing to become bound as in the last preceding Article is mentioned, the returning, filing and duration of the recognizance to be taken under the provisions of that Article, the persons to whom the warrant therein mentioned is to be directed, and the number of persons to be included in such warrant; and the several rules in the last preceding Section contained concerning the sufficiency, amount and notice of bail, also apply in cases where a person is arrested under any such warrant.

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ART. 4.

Where held to bail below.

Provided that where the person indicted has been admitted to bail by the Court from which the indictment has been removed, no such warrant as is mentioned in Article 2 of this Section will be issued by a judge of the Court of Queen's Bench, unless upon affidavit that such person is about to abscond or of other special circumstances. (*b*)

(*b*) Corner's P. 128.

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SECTION 4.

Outlawry. (*a*)

ART. 1.

PROCESS of outlawry (*b*) lies in all cases where a party charged by any indictment or information, would, on conviction, incur the penalties of the Article of the Acts of Crimes and Punishments, or any higher penalties. (*c*)

(*a*) When a woman is outlawed she is called *waived*; because, says Sir Edward Coke, they are not sworn to the law, like men, in leets and tourns, and therefore they are termed *waiviatæ*, *id est*, *derelictæ*, left out or not regarded. Co. Litt. 122 *b*. We have not thought it necessary to preserve this distinction at the present day, but have used the term Outlawry in reference to both men and women.

(*b*) We are inclined to think that the proceedings preparatory to Outlawry might be abbreviated without prejudice to the object sought to be obtained by their adoption. From the facilities granted for superseding outlawries, they may be regarded as having little effect beyond that of compelling appearances. The proclamations at county courts are of very different effect from what they may be supposed to have been in ancient times, when these courts were usually attended by all the suitors of the district; whereas in modern times publicity may be better afforded by other means, and with less formality and delay. The continuance of the ancient formalities also affords grounds for captious objections, which have been countenanced from a leaning in the courts against conclusions concerning the guilt of accused persons made in their absence. We would recommend that three notices in the "Gazette," and the like number in a county paper, should be substituted for the proclamations on the *exigent*. But this alteration of the existing law would be so extensive that we have not introduced it into the text, especially as it regards so important a subject as the punishment of parties in consequence of proceedings taken in their absence.

(*c*) The decisions and opinions on this subject, as they are detailed in Hawk. P. C. b. 2, c. 27, s. 109, are vague and contradictory. If a line is to be drawn distinguishing crimes for this purpose, it would, as it seems to us, be most desirable that it should be determined by the magnitude of the offence as indicated by the penalty.

ART. 2.

Before proceeding to outlawry upon an indictment found in any other Court than the Queen's Bench, such indictment must be removed into the Court of Queen's Bench by writ of *certiorari*, in manner mentioned in Section 1 of Chap. XI. of this Act. (*d*)

(*d*) We concur with the former Commissioners in thinking that it would be advisable to confine the process of outlawry to the Court of Queen's Bench. Such a proceeding is rarely resorted to; and where it is of importance to proceed to outlawry, it would be preferable that it should be conducted in the Queen's Bench, where the practice is better known, and the proceedings themselves more likely to be conducted with accuracy than at the sessions of the peace, or even at the assizes. In this view we have introduced the above Article.

ART. 3.

Outlawry before conviction.

The proceeding to outlawry before conviction, upon an indictment pending, or information filed, for a misdemeanor in the Court of Queen's Bench, is by writ of *venire facias ad respondendum*, directed to the sheriff of the county in which the offence is alleged to have been committed. (*e*)

(*e*) Corner's P. 240.

ART. 4.

If the sheriff return to the writ of *venire facias ad respondendum* that he has summoned the defendant, and the latter make default in appearing thereto, a writ of *distringas* is to be issued on the fourth day after the return of the *venire*.

ART. 5.

If the sheriff return to the writ of *distringas* that the defendant has no lands or goods in his bailiwick whereby he can be distrained, on the fourth day after such return, a writ of *capias ad respondendum* is to be issued.

ART. 6.

In proceeding to outlawry before conviction, upon an indictment pending for treason or felony, in the Court of Queen's Bench, a *capias ad respondendum* is to be issued in the first instance instead of a *venire*.

ART. 7.

On a return of *non inventus* to a *capias ad respondendum*, whether issued in case of treason, felony or misdemeanor, a second *capias* is to be issued on the fourth day after such return. (*f*)

(*f*) The st. 25 Ed. III. c. 14, s. 5, makes provision for the issuing of two *capiases* and an *exigent* by justices in their sessions, and has been held to be applicable only to justices of the peace at their general or quarter sessions; but, as mentioned in the note to Article 2, we propose to repeal the authority of these courts to proceed to outlawry, and to confine the process to the Court of Queen's Bench. By the existing law, it seems that three *capiases* are requisite in that court in all cases of misdemeanor; one only has been held to be sufficient in all indictments for treason, or any other capital offence. It has been doubted whether two were not required on all other indictments for felony; and after judgment, it seems that one only is sufficient. See Haw. P. C. b. 2, c. 27, ss. 111, 112. As the object of these successive writs is to afford opportunity for a caption or surrender, and to give notice to the accused, the above distinctions seem scarcely to be warranted; and, as a more general and simple rule, we recommend that the same number should be required in all cases of proceeding to outlawry before judgment.

ART. 8.

On a return of *non inventus* to such second *capias*, a writ of *exigent* is to be awarded, commanding the sheriff of the county in which the offence is alleged to have been committed, to cause the accused to be exacted from county court to county court until he shall be outlawed according to the custom of England if he shall not appear; and if he shall appear, then commanding the sheriff to take him and keep him, so as to have his body before the court, as directed by the writ.

ART. 9.

Provided that where a person is indicted for treason or felony in the Court of Queen's Bench, and is described in the indictment as being of a different county from that in which he is indicted, then before any *exigent* shall be awarded against such person, a writ of *capias* shall be issued as well to the sheriff of the county wherein such person is indicted as to the sheriff of the county whereof he is described in the indictment, the same *capias* having the space of six weeks at the least, or longer time, by the direction of the justices of such court, if the case require it, before the return of the same; which writs being so returned, such justices shall proceed as they would have done had this process not been made. (*g*)

(*g*) 6 Hen. VI. c. 1, confirmed by 8 Hen. VI. c. 10, which is confirmed by 10 Hen. VI. c. 6. The preamble to this statute recites the abuses which had been committed by causing indictments to be found in the Court of King's Bench by hired jurors; by means of which a capias was caused to be issued to the sheriffs of the county where the court is returnable within two or four days. It is remarkable that the statute provides no sufficient remedy for a great portion of the evil recited. Nothing could be more easy than for the false jurors to describe the accused as of the county where the court was, in which case, instead of the county where he really resided; and in this case the proposed remedy as regarded the giving notice in the real county would fail. As the party must have been conversant in the county where the offence was committed by him, the usual practice is to describe him as of that county; in which case the provisions of the above statute, made to enforce notice in the county in which the party indicted really resides, are inoperative.

The 6 Hen. VI. c. 1, also contains a provision that any *exigent* awarded or outlawry pronounced contrary to the provisions of the above Article shall be void; but it has appeared to us to be unnecessary to insert it.

ART. 10.

Provided also that where a person is indicted for any offence (*h*) in any other Court than the Queen's Bench, and is described in the indictment as being of a county different from that in which he is indicted, then before any *exigent* shall be awarded, on a return of *non inventus* to the first *capias* in manner in Article 7 of this Section mentioned, another writ of *capias* shall be awarded, directed to the sheriff of the county whereof such person is or is described in such indictment as being, returnable before the Court of Queen's Bench, (*i*) at a day certain but not within less than three months from the date of such last-mentioned writ, where the county court is holden from month to month; and where it is holden from six weeks to six weeks, then not within less than four months from the date of such last-mentioned writ; by which second writ of *capias* such sheriff shall be commanded to take the person so indicted by his body, if he can be found within his bailiwick; and if he cannot be found within his bailiwick, then to make proclamation at two county courts before the return of such writ for the person so indicted to appear before the Court of Queen's Bench at the day contained in such second writ of *capias*, to answer to the Queen, or the party, of the offence whereof he is so indicted; after which second writ of *capias* so served and returned, if the

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person indicted come not at the day contained in such writ, the *exigent* shall be awarded against him. (*j*)

(*h*) The words of the Act are, "for treason, felony, or trespass."

(*i*) See 10 Hen. VI. c. 6. By 8 Hen. VI. c. 10, s. 2, such writ of *capias* is returnable before the court before which the party is indicted; but if our suggestion that the process of outlawry should be confined to the Queen's Bench be adopted, this will no longer be proper, and we have therefore omitted that portion of the 8 Hen. VI. c. 10, s. 2.

(*j*) 8 Hen. VI. c. 10, s. 2. This statute, s. 4, provides that the statute 6 Hen. VI. c. 1, concerning process to be made in the King's Bench shall stand in force, notwithstanding anything contained in the 8 Hen. VI. c. 10. This has been doubted notwithstanding this express provision. See Hawk. P. C. b. 2, c. 27, where the question is discussed and the opinion of the author given in favour of the 6 Hen. VI. c. 1, continuing in force. We presume that the insertion of the enactment in question (see Article 9 of this Section) is sufficient without adding any special clause that it is to continue in force, notwithstanding the provisions of the above Article. By sec. 5 it is provided that the statute shall not extend to indictments or appeals taken in the county palatine of Chester: there seems to be at the present day no reason for this exception.

By 8 Hen. VI. c. 10, s. 3, it is also enacted that "any *exigent* awarded upon any such indictment "against the form aforesaid, or any outlawry upon that pronounced, shall be holden for none and void; "and the party upon whom such *exigent* against the form aforesaid is awarded, or outlawry pro- "nounced, shall not be endangered nor put to loss of his goods or chattels, lands or tenements, nor of "his life."

It has appeared to us to be unnessary to insert this provision.

ART. 11.

Provided that nothing in the last two preceding Articles contained shall be applicable where a person shall be indicted for treason or felony, and at the time of such supposed crime was conversant within the county in which he is indicted. (*k*)

(*k*) 8 Hen. VI. c. 10, s. 6. That is to say, that the provision as to process applicable to the case of an indictment in one county against a party dwelling in another at the time of the indictment, shall not be applicable if the party indicted was conversant in the county at the time of the supposed felony or treason.

ART. 12.

Provided also that if a person be described in an indictment as being of the county wherein he is indicted, no such second writ of *capias* as in Articles 9 and 10 of this Section respectively mentioned is necessary, although he be described in such indictment as of another county under an *alias dictus*, (*l*) or be further described as late of another county. (*m*)

(*l*) Haw. P. C. b. 2, c. 27, s. 126.

(*m*) Ib.

ART. 13.

But if a person be not described in an indictment as of any place at present, but only as late of several different counties mentioned, a second writ of *capias* to the sheriff of each of those counties shall be issued in manner in Articles 9 and 10 of this Section respectively mentioned. (*n*)

(*n*) 2 Hale 196; Haw. P. C. b. 2, c. 27, s. 126.

ART. 14.

Where such different county as in Articles 9 and 10 of this Section is mentioned is a county palatine, such second writ of *capias* as therein respectively is mentioned is to be awarded into such county palatine, under the provisions of those Articles respectively. (*o*)

(*o*) 2 Haw. P. C. b. 2, c. 27, s. 125.

ART. 15.

Where the person indicted is or is described in the indictment as being conversant in the county palatine of Lancaster, such second writ of *capias* as in Articles 9 and 10 of this Section respectively is mentioned must be directed to the sheriff of such county palatine. (*p*)

(*p*) 5 and 6 Edw. VI. c. 26; Corner's P. 243.

ART. 16.

Upon the issuing of any such writ of *exigent* as hereinbefore in this Section is mentioned, a writ of proclamation bearing the same day of teste and return as such *exigent*, is also to be issued to the sheriff of the county, city, or town corporate where the accused is mentioned in the indictment or information to be or inhabit, returnable at a day certain not within less than three months from the time of its delivery to such sheriff; whereupon such sheriff shall make three proclamations in the form following and not otherwise; that is to say, one proclamation in the

open county court; one other proclamation at the general quarter sessions of the peace for those parts in which the defendant at the time of the *exigent* awarded shall be dwelling; and another proclamation one month, at the least, before the *quinto exact* by virtue of such writ of *exigent*, at or near to the most usual door of the church or chapel of that town or parish where the defendant shall be dwelling at the time of such *exigent* so awarded; and if the defendant shall be dwelling out of any parish, then at or near to the most usual door of the church or chapel of the parish next adjoining to the place of the defendant's dwelling, being in the same county as the defendant's dwelling; and upon a Sunday immediately after divine service and sermon, if any sermon there be, and, if no sermon there be, then forthwith after divine service. (*q*)

(*q*) 31 Eliz. c. 3, extended to proceedings to outlawry in criminal cases by 4 and 5 W. and M. c. 22, s. 4, made perpetual by 7 and 8 W. III. c. 36, s. 4.

ART. 17.

Outlawry after Conviction.

The proceeding to outlawry after conviction, upon an indictment pending or information filed in the Court of Queen's Bench, is in all cases by writ of *capias ad satisfaciendum*, directed to the sheriff of the county in which the offence is alleged to have been committed.

(*r*) Corner's P. 243, and Rule 10, pursuant to 6 Vic. c. 20.
(*s*) Corner's P. 243.

ART. 18.

One writ of *capias ad satisfaciendum* only is necessary; on a return of *non inventus* to which, a writ of *exigent*, in the same form, and tested and returnable in the same manner as the writ of *exigent* mentioned in Article 8 of this Section, is issuable. (*t*)

(*t*) Corner's P. 243.

ART. 19.

No writ of proclamation as in Article 16 of this Section is mentioned need be issued with the *exigent* awarded on a return of *non inventus* to a writ of *capias ad satisfaciendum*. (*u*)

(*u*) Corner's P. 243.

ART. 20.

The *exigent* ought not to be awarded against one charged as principal and another charged as accessory at the same time; but an *exigent* so awarded is good as against the principal. (*x*)

(*x*) 4 T. R. 521, 535; 2 Hale, 200; Haw. P. C. b. 2, c. 27, ss. 128, 129, 130; 1 Ch. C. L. 352.

ART. 21.

Return.

By virtue of the writ of *exigent* the sheriff is to cause the accused to be called at five successive county courts, and if he do not appear he is to be outlawed by the judgment of the coroner or coroners, as the case may be, for the county.

ART. 22.

Allocatur exigent.

If there be not time for five county courts between the delivery of the writ of *exigent* to the sheriff and the return day of such writ, an *allocatur exigent*, and, if necessary, *alias* or *pluries* writs of *allocatur exigent*, are to be issued in order to give time for calling the accused at five county courts in manner in the last preceding Article mentioned; and each of such writs shall direct that the former exactions shall be allowed.

ART. 23.

When the accused is outlawed a return of the whole proceedings is to be made by the sheriff to the Court of Queen's Bench.

ART. 24.

Return to *exigent*.

The return to a writ of *exigent* must contain a reasonable degree of certainty as to the following particulars:—

1. It must show that the place of holding the county court was within the county, and that such court was held for the county. (*y*) No particular form of words shall be deemed to be necessary, provided the fact can reasonably be collected from the return.

2. Also, the day and year of each exaction, so that the interval between every two exactions was not less than a month.

3. That the persons called did not appear and render themselves.

4. The name or names of the person or persons by whom the outlawry was

pronounced, and the fact that he or they was or were the coroner or coroners for the county. (*z*)

(*y*) 4 Burr. 2564; 2565.
(*z*) R. *v.* Barrington, 4 T. R. 542; Cro. J. 526, 531.

ART. 25.

Return to Writ of Proclamation.

The return to the writ of proclamation mentioned in Article 16 of this Section must state how the proclamations were made. (*a*)

(*a*) 4 T. R. 521.

ART. 26.

Capias utlagatum.

Upon the return of the *exigent* and writ of proclamation the outlawry is considered to be complete, and a writ of *capias utlagatum* directed to the sheriff of any county in which the outlaw is supposed to be may be issued at any time when it is likely that such outlaw can be taken, by which such sheriff is commanded to take such outlaw, so that he have his body before the Court of Queen's Bench on a day specified in such writ, or, instead thereof, in cases of treason or felony, a special writ of *capias utlagatum*, directed as hereinbefore in this Article is mentioned, may be issued, by which such sheriff, in addition to taking such outlaw, shall be commanded to inquire by a jury what goods and chattels, lands and tenements, such outlaw had at the date of such special *capias utlagatum*, and to seize and appraise the same to Her Majesty's use. (*b*)

(*b*) Corner's P. 242.

ART. 27.

Where the outlaw is supposed to be in the county palatine of Lancaster, the writs of *capias utlagatum* are to be directed to the Chancellor of that county. (*c*)

(*c*) 5 and 6 Edw. VI. c. 26; Corner's P. 243.

ART. 28.

The writs hereinbefore in this Section mentioned shall be tested and returnable according to the course and practice of the Court of Queen's Bench.

ART. 29.

Supersedeas.

Where a person against whom process of outlawry has issued before conviction upon an indictment or information surrenders himself, or is taken at any time before the outlawry is complete, he is to be dealt with and may be admitted to bail in the same manner as if he had been taken on the writ of *capias* mentioned in Section 2 of this Chapter, and a writ of *supersedeas* (*d*) may in like manner be issued to protect him against such process.

(*d*) Corner's P. 245.

ART. 30.

Where a person against whom process of outlawry has issued after conviction upon an indictment or information surrenders himself, or is taken at any time before the outlawry is complete, he is to be committed to satisfy the indictment or information; but a writ of *supersedeas* may be issued to protect him against such process. (*e*)

(*e*) Corner's P. 245.

ART. 31.

Effect of outlawry in capital cases.

An outlawry in the case of any capital offence amounts to a conviction and attainder of such offence. (*f*)

(*f*) Hawk. P. C. b. 2, c. 48, s. 22.

ART. 32.

In other cases.

An outlawry in the case of any other than a capital offence amounts only to a conviction of the contempt for not appearing to answer the indictment or information; (*g*) and where such outlawry is after conviction upon an indictment or information, it suspends all further proceedings upon such conviction, so long as such outlawry remains unreversed. (*h*)

(*g*) Starkie's C. Pl. 288.
(*h*) Rex *v.* Wilkes, 4 Burr. 2533.

ART. 33.

Outlawry against traitors resident abroad.

All process of outlawry against any person indicted for treason, who shall be resident out of the limits of this realm, or beyond the seas at the time of such outlawry pronounced against him, shall be as good and effectual in the law, to all intents and purposes, as if such person had been resident within this realm at the time of such process awarded and outlawry pronounced. (*i*)

(*i*) 26 Hen. VIII. c. 13, s. 4; 5 and 6 Edw. VI. c. 11, s. 7.

ART. 34.

Provided that if the person so outlawed as in the last preceding Article is mentioned shall, within one year next after such outlawry pronounced, or judgment given upon such outlawry, yield himself unto the Chief Justice of England for the time being, and offer to traverse the indictment whereupon such outlawry shall have been pronounced, he shall be allowed so to traverse such indictment; and in case he shall be thereupon found "not guilty" by the verdict of 12 men, he shall be clearly acquitted and discharged of such outlawry, and of all penalties and forfeitures by reason of the same, in as large and ample manner and form as though no such outlawry had been made. (*k*)

(*k*) 5 and 6 Edw. VI. c. 11, s. 8.

CHAPTER IV.

OF COPIES OF INDICTMENTS AND DEPOSITIONS, LISTS OF WITNESSES AND JURORS, ASSIGNMENT OF COUNSEL, QUASHING INDICTMENTS, PARTICULARS, AND AMENDING INFORMATIONS.

ART. 1.

Treason. Copy of indictment.

WHOSOEVER shall be indicted for treason, or misprision of treason, shall, upon his attorney or agent requiring the same, and paying the proper officer his reasonable fees, not exceeding five shillings, for the writing thereof, have a true copy of the whole indictment (*a*), including the caption (*b*), delivered to him 10 days (*c*) at the least before his arraignment (*d*), and in the presence of two or more credible witnesses (*e*), so as to be enabled to advise with his counsel thereupon to plead and make his defence. (*f*)

(*a*) The 7 and 8 Wm. III. c. 3, s. 1, directs a copy of the indictment, *but not the names of witnesses*, to be delivered; but the stat. 7 Ann, c. 21, s. 11 (see the next Article), directs a list of the witnesses to be also given.

(*b*) Fost. 229, 230; 1 East, P. C. 113.

(*c*) 7 and 8 Wm. III. c. 3, s. 1, requires such copy to be delivered five days before the trial; but the stat. 7 Ann, c. 21, s. 11, requires it to be delivered 10 days before the trial.

(*d*) By the 7 and 8 Wm. III. c. 3, s. 1, and the 7 Ann, c. 21, s. 11, such delivery was to be before trial; but now, by 6 Geo. IV. c. 50, s. 21 (see Art. 3), it is to be before arraignment.

(*e*) 7 Ann, c. 21, s. 11.

(*f*) 7 and 8 Wm. III. c. 3, s. 1, in part.

ART. 2.

List of witnesses.

So also whosoever shall be indicted for treason or misprision of treason shall have a list of the witnesses to be produced on the trial for proving such indictment, mentioning the names, profession, and place of abode of such witnesses, delivered to him 10 days, at the least, before his arraignment (*g*), and in presence of two or more credible witnesses. (*g*)

(*g*) By the 7 Ann, c. 21, s. 11, before the trial; but see the 6 Geo. IV. c. 50, s. 21, which directs the delivery of indictments to 10 days before the arraignment. By the 7 Ann, c. 21, s. 11, the list of witnesses is required to be delivered at the same time as the copy of the indictment, and in the case of R. *v.* Frost and others, 9 C. and P. p. 136, it was held not to be sufficient, within the meaning of the Act, that the list of witnesses was delivered 10 days before the arraignment, if it was not also delivered *at the same time* as the copy of the indictment: we are not aware of any advantage derivable from this simultaneous delivery of the list of witnesses and copy of the indictment. The object of the Act was to ensure the delivery of both a sufficient time before trial to enable the party indicted to prepare his defence. We therefore recommend the omission of so much of the 7 Ann, c. 21, s. 11, as makes it obligatory to deliver the list of witnesses and copy of the indictment at *the same time*. We recommend a similar omission in the case of the 6 Geo. IV., c. 50, s. 21, embodied in the next Article, which requires the delivery, where the party is indicted in any other Court than the Queen's Bench, of the list of the petit jury at the same time as the copy of the indictment.

ART. 3.

List of jury.

So also whosoever shall be indicted for treason or misprision of treason in any Court other than the Court of Queen's Bench, shall have a list of the petit jury, mentioning the names, profession, and place of abode of the jurors, delivered to him 10 days, at the least, before his arraignment, and in the presence of two or more credible witnesses; and whosoever shall be indicted for treason or misprision of treason in the Court of Queen's Bench shall have a copy of the indictment delivered to him within the time and in the manner mentioned in Article 1 of this Chapter; but the list of the petit jury made out as hereinbefore in this Article is

mentioned, may be delivered to him at any time after the arraignment, so as the same be delivered 10 days before the day of trial. (*h*)

(*h*) 6 Geo. IV. c. 50, s. 21, in part.

ART. 4.

The 10 days before the arraignment mentioned in the last three preceding Articles are to be reckoned exclusively of the day of delivery and day of arraignment, and the 10 days before the day of trial mentioned in the last preceding Article are to be reckoned exclusively of the day of delivery and the day of trial; (*i*) and in every such case the 10 days are to be reckoned exclusively of Sunday. (*j*)

(*i*) Fost. 230; Haw. P. C. b. 2, c. 39, s. 15; 1 East, P. C. 112.
(*j*) Fost. 230; 1 East, P. C. 112; 4 Comm. 352; 1 Chitty's C. L. 405.

ART. 5.

If a person indicted for treason or misprision of treason plead to the indictment without claiming a copy of it under Article 1 of this Section, or without having had such copy delivered to him within the time specified in that Article, or without having had a list of the witnesses or of the petit jury, respectively made out as in Articles 2 and 3 of this Section is mentioned, delivered to him within the times in such last-mentioned Articles respectively specified, any objection in respect of such non-delivery or defective delivery is waived. (*k*)

(*k*) Fost. 230; 2 Salk. 634; Comb. 5.
In R. *v.* Frost and others, 9 Car. and Payne, 136, where the objection that the list of witnesses had not been delivered according to the statute, was not made until the first witness was called upon the trial, it was held to be too late. We submit that it would be better to have one uniform rule that it should be too late to object to the non-delivery or defective delivery of any of the documents specified in Articles 1, 2, and 3 of this Section after plea pleaded.

ART. 6.

Exception in case of treason in compassing death, &c. of sovereign.

Provided that nothing in Articles 1, 2, and 3 of this Chapter contained shall apply to any person who shall be indicted for treason in compassing, imagining, inventing, devising, or intending death or grievous bodily harm to the King or Queen for the time being in possession of the Crown of this realm, or for misprision of any such treason. (*l*)

(*l*) See 39 and 40 Geo. III. c. 93; 6 Geo. IV. c. 50, s. 21; 5 and 6 Vic. c. 51, s. 1.

ART. 7.

In all cases of prosecutions for misdemeanors in the Court of Queen's Bench, either party may obtain a copy of the indictment or information from the Crown Office [on payment of a reasonable sum for the same, not exceeding at the rate of 1½*d.* for each folio of 90 words]. (*m*)

(*m*) Corner's P. 126. We have introduced the words between brackets in analogy to the charge which may be demanded for making copies of depositions, in pursuance of the 11 and 12 Vic. c. 42, s. 27.

ART. 8.

In all cases of prosecutions for misdemeanors instituted by Her Majesty's Attorney or Solicitor-General in the Court of Queen's Bench, or at any session of the peace, session of oyer and terminer, or session of gaol delivery, the Court shall, if required, make order that a copy of the indictment or information shall be delivered, after appearance, to the party prosecuted, or his attorney, upon application made for the same, free from all expense to the party so applying, provided that such party, or his attorney, shall not have previously received a copy thereof. (*n*)

(*n*) 60 Geo. III. and 1 Geo. IV. c. 4, s. 8.

ART. 9.

Copy of indictment in other cases.

In all cases other than those hereinbefore in this Chapter specified, it is at the discretion of the Court to grant a copy of the indictment, or of so much as may be necessary to enable the party accused to make any special exception, or to frame any special plea. (*o*)

(*o*) See Haw. P. C. b. 2, c. 39, s. 13. The rule is laid down with the cautionary preface, "It is said;" but there are authorities in favour of the rule, which seems to be a reasonable one. We even think that the rule should be carried further, and that a person should be entitled to have a copy of the indictment in all cases, as of right, upon payment of a reasonable sum for making the same. Indeed, there appears to be no sufficient reason why the proceedings upon prosecutions for felonies and misdemeanors should not, except as regards the right to be bailed, and perhaps one or two other matters, be assimilated in all cases.

ART. 10.

Copies of depositions.

All persons who shall be committed to prison or admitted to bail, as in Section 5 of Chapter I. of this Act is mentioned, may at any time after all the examinations required by that Section shall have been completed, and before the first day of the assizes or sessions or other first sitting of the Court at which such persons are to be tried, require and shall be entitled to have of and from the officer or person who shall have the custody of the same, copies of the depositions on which they shall have been committed or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of 1½*d.* for each folio of 90 words; (*p*) provided that, if such demand shall not be made before the day appointed for the commencement of the assizes or sessions at which the trial of the person in whose behalf such demand shall be made is to take place, such person shall not be entitled to have any copy of such depositions, unless the judge or other person to preside at such trial shall be of opinion that such copy may be made and delivered without delay or inconvenience to such trial; but it shall nevertheless be competent for such judge or other person, if he shall think fit, to postpone such trial on account of such copy of depositions not having been previously had by the party charged. (*q*)

(*p*) 11 and 12 Vic. c. 42, s. 27.
(*q*) 6 and 7 Wm. IV. c. 114, s. 3, in part.

ART. 11.

Inspection of depositions.

All persons under trial shall be entitled at the time of their trial to inspect, without fee or reward, all depositions or copies thereof which have been taken against them, and returned into the Court before which such trial shall be had. (*r*)

(*r*) 6 and 7 Wm. IV. c. 114, sec. 4. We recommend the omission of Articles 15 to 18 inclusive of this Chapter of the Act of Procedure, which Articles relate to the Assignment of Counsel upon indictments for Treason. The 7 and 8 Wm. III. c. 3, s. 1, which authorizes the assignment of Counsel in such cases was passed at a time when full defence by counsel was not allowed except in cases of misdemeanor; but since the passing of the Act which alters the law in this respect, as regards persons indicted for Felony, it is unnecessary any longer to retain this special provision in the case of Treason, except so far as it allows two counsel to persons indicted for Treason, which will be provided for under a subsequent Chapter. The following are the Articles omitted:—

"ART. 15.

Assignment of Counsel. Treason.

"In case any person or persons accused or indicted, as in Article 1 is mentioned, shall desire "counsel, the Court before whom such person or persons shall be tried, or some Judge of that Court "shall, and is authorized and required immediately, upon his or their request, to assign to such person "and persons such and so many counsel, not exceeding two, as the person or persons shall desire, to "whom such counsel shall have free access at all seasonable hours.*

"* 7 and 8 Wm. III. c. 3, s. 1, in part.

"ART. 16.

"If several be jointly indicted, each is separately entitled to two counsel.†

"† 1 East, P. C. 111.

"ART. 17.

"The application may be made by a counsel, attorney, or agent.‡

"‡ Haw. P. C. b. 2, c. 39, s. 10; Foster 230, note; 1 East, P. C. 114.

"ART. 18.

"After counsel have been assigned, the Court will not discharge them though they desire it; but "may add others to those already assigned.§

"§ Haw. P. C. b. 2, c. 39, s. 8."

ART. 12.

Pauper. Counsel.

Upon an indictment found or information filed against any person he may upon his making affidavit that he is not worth 5*l.* in the world, his necessary implements of trade, bed, bedding, and wearing apparel only excepted defend *in formâ pauperis*, if the Court before which he is to be tried will allow it. (*s*)

(*s*) 1 Chitty's C. L. 412; Chitty's Burn's Justice, tit. "Pauper," and the cases there cited.

ART. 13.

When a person is allowed by the Court to defend *in formâ pauperis*, neither the officers of the Court nor those who are assigned to conduct his cause may take fees. (*t*)

(*t*) Chitty's Burn's Justice, tit. "Pauper," citing Hullock, 228, n. 1.

ART. 14.

A defence *in formâ pauperis* is allowable, although the indictment has been removed by writ of *certiorari* by the accused himself.

ART. 15.

A prisoner for debt who removes an indictment by writ of *certiorari*, may be allowed to defend *in formâ pauperis*. (*u*)

(*u*) *Ex-parte* Nicholson, 4 Jur. 506.

ART. 16.

A prosecutor is not allowed to prosecute *in formâ pauperis* unless, in addition to the ordinary petition and affidavit of poverty, he produce a certificate signed by a counsel that he has good cause to prosecute. (*x*)

(*x*) See R. *v.* Wilkes, 1 Dowl. P. C. 536; Corner's P. 167.

ART. 17.

Assignment of Counsel in cases of perjury committed by witnesses upon trials.

Any of Her Majesty's justices of assize, or nisi prius, or general gaol delivery, or of the counties palatine, (during the sitting of the court or within twenty-four hours after), may direct any person examined as a witness upon any trial before him to be prosecuted for the offence of perjury, in case there shall appear to him a reasonable cause for such prosecution, and that it shall appear to him proper so to do; and may assign the party injured, or other party undertaking such prosecution, counsel, who shall do their duty without any fee, gratuity, or reward for the same; and every such prosecution so directed shall be carried on without payment of any tax or duty, and without payment of any fees in court, or to any officer of the court who might otherwise claim or demand the same. And the clerk of assize, or his associate, or prothonotary, or other proper officer of the Court, (who shall be attending when such prosecution is directed), shall, without any fee or reward, give the party injured or other person undertaking such prosecution, a certificate of the same being directed, together with the names of the counsel assigned him by the Court, which certificate shall, in all cases, be deemed sufficient proof of such prosecution having been so directed: provided that no such direction or certificate shall be given in evidence upon any trial to be had against any person upon a prosecution so directed. (*y*)

(*y*) 23 Geo. II. c. 11, s. 3.

ART. 18.

Motion to quash.

It is discretionary in the Court to quash an indictment for any such insufficiency either in the caption or the body of such indictment as will make any judgment whatsoever given upon any part of it erroneous. (*z*)

(*z*) Haw. P. C. b. 2, c. 25, s. 146.

The general rule is clear and simple, and founded in manifest convenience, inasmuch as it can effect no good purpose to proceed on a charge manifestly illegal. There, are, however, numerous authorities to be found in the books, which show that even, although an indictment be clearly defective, and although the Court has power to quash it, yet that the Court will frequently refuse to exercise this authority for a great number of particular reasons, such refusals being, after all, merely discretionary, and being founded on reasons so various as scarcely to be reducible to any general principles, cannot supply grounds for any general rule.

We have omitted Articles 26 and 27 of Chapter IV. of the Act of Procedure, as there appears to be no more reason for inserting as rules the decisions which have been made in the particular cases mentioned in those Articles than those which have been made in other cases. The power is altogether a discretionary one. The Articles referred to are the following:—

"ART. 26.

"The Court will not quash an indictment after the defendant has removed it by *certiorari* and been "convicted at the trial.*

"* R. *v.* Taylor, 9 Dowl. P. C. 600, even although the bill was found illegally; *ib.* Corner's P. "165.

"ART. 27.

"An indictment removed by *certiorari*, at the instance of the defendant, may be quashed before the "defendant has appeared.†

"† R. *v.* Stowell, 1 Dowl. N. S. 320."

ART. 19.

Motion to quash indictment, when to be made.

A motion to quash an indictment must be made before the jury are sworn. (*a*)

(*a*) This was so held in R. *v.* Law, 2 M. and R. 197. This, however, has been frequently done where the defect is manifest; Lord Tenterden, upon a trial at York, on an indictment for blasphemy, quashed the indictment because no time was alleged.

We recommend the repeal of the 7 and 8 Wm. III. c. 3, s. 9, the provisions of which, so far as they are still applicable, are embodied in Article 33 of Chapter IV. of the Act of Procedure, since it appears to us to be unnecessary to have a rule as to the period at which motions may be made to quash indictments for Treason different from that in the case of other offences. The provision does not give power to quash in any case where it did not exist before, but only limits the period within which the

motion is to be made for that purpose; and it has been settled in the construction of the statute (Rookwood's Case, 4 St. Tr. 673–678; Hawk. P. C. b. 2, c. 25, s. 148), that no such motion can be made after plea pleaded. Neither are we aware of any reason why judgments upon indictments for Treason should be arrested in other cases than those in which judgments upon indictments for felony may be arrested. The Article omitted is the following:—

"ART. 33.

Quashing for defect.

"No indictment for any of the offences in Article 1 mentioned, nor any process or return thereupon, "shall be quashed on the motion of the prisoner or his counsel for mis-writing, or mis-spelling, unless "exception concerning the same be taken and made in the respective Court where such trial shall be, "by the prisoner or his counsel, assigned, before any evidence given in open Court upon such indict-"ment; nor shall any such mis-writing, or mis-spelling, after conviction on such indictment, be any "cause to stay or arrest judgment thereupon; but nevertheless any judgment given upon such indict-"ment shall and may be liable to be reversed upon a writ of error in the same manner, and no other, "as if this provision had not been made.*

"* 7 and 8 Wm. III. c. 3, s. 9. The Act after the word 'mis-spelling' adds the words 'false or "'improper Latin,' which are now inapplicable."

ART. 20.

Further particulars.

It shall be competent to the Court, upon the application of the accused, before he has pleaded or demurred to an indictment or information, to make such order on the prosecutor for supplying further particulars of the charge contained in such indictment or information as to such Court shall seem to be just. (*b*)

(*b*) See R. *v.* Hamilton, 7 C. & P. 448. It appears to us desirable to authorize the allowance of *particulars* in criminal in like manner as in civil cases. Without considering whether, according to our recommendations in another place, the statements in indictments may with propriety be further restricted than at present with regard to details of circumstances, it is obvious that, according to the existing law, the charges in indictments are in a great many instances more general, and admit of more allowable deviation in the proofs than is permitted in civil cases. The furnishing of copies of depositions may, indeed, often be equivalent to granting further particulars; but it is not essential that any depositions in writing should be taken previously to the inquest of the grand jury. And the depositions may have been taken in such a negligent manner as not to convey a sufficiently distinct intimation of the charge sought to be substantiated.

ART. 21.

Such particulars, as in the last preceding Article are mentioned, shall be verified by oath and annexed to the indictment or information, and shall be of the same effect and validity as regards the proof of the offence to be given on the trial as though the contents had been found by a grand jury.

ART. 22.

Provided that no such particulars as in Article 20 of this Chapter are mentioned shall be available to substantially vary the charge contained in any indictment or information, or to render any indictment or information valid where such indictment or information is insufficient in law.

ART. 23.

Amendment of indictments.

An indictment cannot, except where it is in this Act otherwise expressly provided, be amended in matter of substance. (*c*)

(*c*) 1 Chitty's C. L. 297, 335, 443.

ART. 24.

Amendment.

The caption of an indictment transmitted to the Court of Queen's Bench in pursuance of a writ of *certiorari* may, at any time, (*d*) upon motion to that Court, be amended by the proper officer of the Court before which the indictment was found, so as to make it agree with the original record. (*e*)

(*d*) See 3 Mod. 167; Comb. 73; Cro. Jac. 502; 1 Str. 138; 2 Str. 843; 2 Lord Raym. 1518; 4 Burr. 2527; 1 Sid. 244; 4 Bulst. 35; 1 W. Saund. 248, n. 1; Chitty's C. L. 335; Stark. C. P. 263.

(*e*) See Hawk. P. C. b. 2, c. 25, s. 97; and also see Article 13, Section 3 of Chapter II. of the Act of Procedure, which is as follows, but which appears to be too limited, and does not state by whom the amendment is to be made.

"ART. 13.

"A mistake as to the names of the judges, justices, or other judicial officers stated in the caption, "is amendable. (4 East, 174.)"

ART. 25.

Amendment of criminal information.

Defective criminal informations are amendable at the discretion of the Court at any time before the jury are sworn. (*f*)

(*f*) An information is the mere assertion of the officer, but an indictment, which is the finding of a grand jury on oath, cannot be amended. See 4 Burr. 2527–2568, 9; 4 T. R. 457; 1 Stra. 185; 2 Str. 871.

Chap. IV.

ART. 26.

Informations filed by the Attorney-General are amendable as in the last preceding Article is mentioned without payment of costs. (*g*)

(*g*) R. *v.* Dean, Trin. 1838; Corner's P. 179.

It will be unnecessary if our suggestion as to abolishing the coroner's inquisition as a mode of formal charge be adopted, to insert any Articles in the Digest similar to Articles 39, 40, 41, and 42 of Chap. IV. of the Act of Procedure. Those Articles are as follows:—

"ART. 39.

Inquisition may be quashed—when.

"A coroner's inquisition may be quashed for defects appearing on the face of it, either wholly or in "part, on the application either of the party interested or the Crown.*

"* In re Cully, 5 B. & Ad. 230; ex-parte Carruthers, 2 M. & R. 397; R. *v.* Brownlow, 11 Ad. & "Ell. 119; Corner's P. 60.

"ART. 40.

"It may also be quashed for the misconduct of the coroner or the jury.†

"† Corner's P. 60.

"ART. 41.

"An inquisition may be amended in matter of form, but not in any matter of substance.‡

"‡ R. *v.* Evett, 6 B. & C. 247.

"ART. 42.

"Provided that no inquisition found upon or by any coroner's inquest, nor any judgment recorded "upon or by virtue of any such inquisition, shall be quashed, stayed, or reversed, for the insertion of "the words 'upon their oath,' instead of the words 'upon their oaths;' nor because any person or "persons mentioned in any such inquisition, is or are designated by a name of office or other de-"scriptive appellation instead of his, her, or their proper name or names; nor by reason of the "non-insertion of the names of the jurors in the body of any such inquisition, or of any difference "in the spelling of the names of any of the jurors in the body of any such inquisition, and the "names subscribed thereto, nor because any juror or jurors shall have set his or their mark or marks "to any such inquisition instead of subscribing his or their names thereto; nor because any such "mark or marks is or are unattested, provided the name or names of such juror or jurors is or are "set forth; nor because any juror or jurors has or have signed his or their Christian name or names "by means of an initial or partial signature only, and not at full length; nor because of any erasures "or interlineations appearing in any such inquisition, unless the same shall be proved to have been "made therein after the same was signed; nor for want of a proper *venue* where the inquest shall "appear or purport to have been taken by a coroner of or for the county, riding, city, borough, "liberty, division, or place in which it shall appear or purport to have been taken; nor (except "only in cases of murder or manslaughter), for or by reason of any such inquisition not being duly "sealed or written upon parchment; nor by reason of any such inquisition having been taken before "any deputy instead of the coroner himself; nor because the coroner and jury did not all view the "body at one and the same instant, provided they all viewed the body at the first sitting of the "inquest. And in all or any of such cases of technical defect as are hereinbefore mentioned, it "shall be lawful for any judge of either of Her Majesty's Courts at Westminster, or any judge of "assize or gaol delivery, if he shall so think fit, upon the occasion of any such inquisition being "called in question before him, to order the same to be amended in any of the respects aforesaid, "and the same shall forthwith be amended accordingly.*

"* 6 & 7 Vic. c. 83, s. 2. The Criminal Law Commissioners state that they have inserted this long "list of errors in the words of the statute, after having omitted others specifically provided for by "other Articles of this Act."

CHAPTER V.

ARRAIGNMENT—PLEA—DEMURRER—ISSUE.

SECTION 1.

Arraignment.

ART. 1.

Chap. V. Sec. 1.

A PERSON against whom an indictment has been found or information filed, being in the custody of the Court, is, previously to his trial, to be arraigned, that is to say, being brought to the bar of the Court, he is to be called upon by name, the indictment or information is to be read to him, and he is to be asked whether he be guilty or not guilty of the offence charged in such indictment or information.

ART. 2.

So where a person against whom an indictment has been found or information filed is present in Court, but not actually in custody, he may be detained and arraigned in manner mentioned in the last preceding Article, or may be left to be taken by the ordinary legal process, in the discretion of the Court.

ART. 3.

Where a person against whom an indictment has been found or information filed is in any other custody than that of the Court before which he is to be tried, he may be brought before such Court by writ of *Habeas Corpus* for the purpose of being arraigned.

ART. 4.

A person upon his arraignment is to be brought to the bar without irons, shackles, or other restraint, unless there be danger of escape, and is so to continue during the time of his trial. (*a*)

Prisoners to be free from unnecessary restraint at time of arraignment.

(*a*) 2 Hale, 219; Haw. P. C. b. 2, c. 28, s. 1; Kel. 10; 2 Inst. 315; Bracton, 137; Britton, 14, 17: but see Larger's case, 6 St. Tr. 230, where a difference was taken between the time of arraignment and the time of trial; and accordingly the prisoner stood at the bar in chains during the time of his arraignment.

ART. 5.

If several indictments for the same offence have been found against any person, he may be arraigned and tried at the same time on all of them. (*b*)

Several indictments.

(*b*) 2 Hale, 221; 1 East's P. C. 371; 1 Salk, 382.

ART. 6.

Where several persons are charged in the same indictment, all ought to be arraigned at the same time. (*c*)

Several defendants.

(*c*) Kel. 9.

ART. 7.

The arraignment must be entered of record by the proper officer of the Court. (*d*)

Arraignment to be entered of record.

(*d*) 3 Mod. 365; Haw. P. C. b. 2, c. 28, s. 6.

ART. 8.

If a person upon arraignment stand mute, and it be doubtful whether or not he be mute of malice, the Court may direct a jury to be forthwith impannelled and sworn to try whether he be mute of malice or by the act of God. (*e*)

Where prisoner stands mute.

(*e*) 4 Black. Comm. 324.

ART. 9.

Such jury may consist of any twelve men who may happen to be present. (*f*)

(*f*) 1 Chitt. C. L. 424.

ART. 10.

If such person as in Article 8 of this Section is mentioned be found to be mute by the act of God, the court in its discretion may use such means as may be necessary and sufficient to cause him to understand the charge contained in the indictment or information against him and to convey his answer: should this be impossible, a plea of not guilty is to be entered, and the trial is to proceed. (*g*)

(*g*) 4 Black. Comm. 329; 1 Chitt. C. L. 417, 424; Steph. C. L. 280.

ART. 11.

If any person against whom an indictment has been found or information filed be insane, and upon arraignment be found so to be by a jury lawfully empannelled for that purpose, so that such person cannot be tried upon the indictment or information against him, it shall be lawful for the Court before whom any such person shall be brought to be arraigned to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody until Her Majesty's pleasure shall be known; and in all cases of insanity so found, it shall be lawful for Her Majesty to give such order for the safe custody of such person so found to be insane, during Her pleasure, in such place and in such manner as to Her Majesty shall seem fit. (*h*)

Insanity.

(*h*) 39 and 40 Geo. III. c. 94, s. 2, in part.

ART. 12.

A jury empanelled under the provisions of the last preceding Article may form their own judgment as to the insanity of the prisoner, from his demeanor during the time of taking the inquest without further evidence. (*i*)

(*i*) R. *v.* Goode, 7 Ad. and Ell. 536.

ART. 13.

Where the prisoner exhibits strong symptoms of insanity during the taking of the inquest, it is unnecessary to ask him whether he would question any of the witnesses, or offer any remarks on the evidence.

Chap. V. Sec. 2.

SECTION 2.

Plea, Demurrer, and Issue.

Art. 1.

A Person upon being asked, as in Article 1 of the last preceding Section is mentioned, whether he be guilty or not guilty of the offence charged against him, may either confess the charge to be true or plead or demur to the same in manner hereinafter in this Section mentioned.

Art. 2.

A person against whom an indictment for treason or felony shall have been found must confess, plead, or demur as in the last preceding Article is mentioned immediately after his arraignment. (*a*)

(*a*) Com. Dig. "Indt. L."

Art. 3.

No imparlance.

A person against whom an indictment for a misdemeanor shall have been found in the Court of Queen's Bench, or removed into that Court, or against whom an information shall have been filed, who shall appear in term time in person to answer such indictment or information shall not, upon being [arraigned], (*b*) be permitted to imparl to a subsequent term, but must plead or demur thereto within four days from the time of his appearance, and in default of pleading or demurring within four days, judgment may be entered against him for want of a plea; and in case such party shall appear to such indictment or information by his attorney, it shall not be lawful for him to imparl to a following term, but a rule requiring such party to plead may be forthwith given and a plea or demurrer to such indictment be enforced or judgment entered according to the course and practice of the Court, (*c*) as though an imparlance in a previous term had been allowed. (*d*)

(*b*) The words of the Act are, "upon being charged therewith."
(*c*) The words of the Act are, "as might have been done before the passing of this Act."
(*d*) 60 Geo. III. and 1 Geo. IV. c. 4, s. 1.

Art. 4.

Time to plead.

Provided that it shall be lawful for the Court of Queen's Bench, or for any judge of the same, upon sufficient cause shown for that purpose, to allow further time for a party to plead or demur to any such indictment or information as in the last preceding Article is mentioned. (*e*)

(*e*) 60 Geo. III. and 1 Geo. IV. c. 4, s. 2.

Art. 5.

Inhabitants of parish, &c. entitled to imparl.

Provided also that if inhabitants of a county or parish or any other persons against whom an indictment or information shall be pending in the Court of Queen's Bench for the non-repair of any bridge or highway, shall appear on the return of a writ of *venire facias ad respondendum*, they are entitled to imparl to the following term. (*f*)

(*f*) Corner's P. 134. These cases are excepted out of the 60 Geo. III. and 1 Geo. IV. c. 4, s. 1, which takes away the imparlance in other cases: see s. 10 of that Act.

Art. 6.

In custody, but not for 20 days before session at which indictment found.

A person against whom an indictment for a misdemeanor shall have been found at any session of oyer and terminer, general gaol delivery, or of the peace, who shall be in actual custody, must plead to such indictment at the same session. (*g*)

(*g*) Fry's case, 1 Leach's C. C. L. 129. This rule is, as it seems, applicable, although the indictment be for an offence different from that on which the party is in custody. Being in custody, he is entitled to be tried under the commission of gaol delivery; and, although he may defer the trial, and may be let out on bail, he is not, as it seems, at common law, exempted from pleading. In Wakefield's case, 1 Lewin's C. C. 275, the defendant having been committed for a felony, the grand jury found a bill for a misdemeanor; and, on motion made that he should be allowed to traverse to the next assizes, Park, J., held that no motion could be made on the subject until the prisoner had pleaded. In Grubbin's case, 1 Lewin's C. C. 314, the prisoner having been committed for a capital offence, and tried upon it, a bill was, during the trial, found against him for a misdemeanor; Bayley, J., held that the prisoner was entitled to traverse without pleading instanter to the indictment, and considered the case to be governed by the words of the stat. 60 Geo. III. and 1 Geo. IV. c. 4, s. 3: see also Lee's case, 2 Lewin's C. C. L. 276. It seems, however, to be clear that the object of the statute was to prevent delay by putting off the trial; and the 3rd section does not relieve a party from pleading, as he would before have been compellable to do, but only under specified circumstances compels him to plead and try, when he would not have been compellable to try before. In Hewson's case, 2 Lewin's C. C. L. 277, Parke, B., intimated his opinion that the statute did not exempt a party from pleading who was under recognizance prior to the assizes, although within 20 days; and he considered the exemption from pleading to apply only to the case where a party, not having been in custody, and not having been held to bail or bound in recognizance before the assizes, is held to

bail at the assizes to *appear* and try at the following assizes. There seems, however, to be no reason why the party so held to bail should not be called on to plead at the same assizes or sessions, and be bound to try at the next; this course seems to be most consonant with the provisions of the stat. 60 Geo. III., and 1 Geo. IV. c. 4.

ART. 7.

Confession.

If a person against whom an indictment shall have been found, or information filed for any offence, shall confess the charge to be true, his confession shall be entered on record by the proper officer of the court, and sentence shall be pronounced against him in the same manner as if he had been convicted by the verdict of a jury. (*h*)

(*h*) 4 Black. Comm. 330; 1 Chitt. C. L. 602; Steph. C. L. 281.

ART. 8.

If a person against whom an indictment for a misdemeanor shall have been found in the Court of Queen's Bench, or removed into that Court, or against whom an information shall have been filed, shall confess the charge to be true, judgment shall be signed immediately, but execution may be stayed by consent of the prosecutor or on the order of a judge of the Court of Queen's Bench, until the fifth day of the next term. (*i*)

(*i*) Corner's P. 132.

ART. 9.

Where an inhabitant of a county or parish has by writ of *certiorari* removed an indictment against the county or parish for the non-repair of a highway or bridge, and has entered into the recognizance required by Article 11 of Section 1 of Chapter XI. of this Act, the other inhabitants cannot plead guilty to such indictment.

ART. 10.

Judgment may be arrested, falsified, or reversed, after a confession or plea of guilty, in the same manner as after a conviction by the verdict of a jury. (*j*)

(*j*) Haw. P. C. b. 2, c. 31, s. 4.

ART. 11.

Plea to the jurisdiction.

If the accused object to the jurisdiction of the Court before which he is arraigned, he may plead his objection; but in that case, he must do so before pleading any other plea. (*k*)

(*k*) 4 Black. Comm. 333. By the plea of not guilty, the defendant admits the jurisdiction of the Court to try him, Fost. 16; Haw. P. C. b. 2, c. 34, s. 4.

ART. 12.

An objection to the jurisdiction must be pleaded, (*l*) unless the jurisdiction be specially limited by any Article of this Act, (*m*) or unless the objection, if valid, show that no Court in England has jurisdiction over the offence. (*n*)

(*l*) Fost. 16; Hawk. P. C. b. 2, c. 38, s. 5.
(*m*) 1 East. 352; 1 Chitty's C. L. 438.
(*n*) 6 East, 583.

ART. 13.

Every plea to the jurisdiction must show what Court, if any, has jurisdiction to try the person pleading such plea. (*o*)

(*o*) If no other Court has jurisdiction, the Queen's Court has. See Foster 18 1 Chitt. C. L. 438.

ART. 14.

Every plea to the jurisdiction must be supported by an affidavit of the truth of the facts averred. (*p*)

(*p*) Black. Comm. 333; Steph. C. L. 284.

ART. 15.

The prosecutor on the part of the Crown may reply or demur immediately to a plea to the jurisdiction. (*q*)

(*q*) 1 Chitt. C. L. 439.

ART. 16.

If the decision of the Court upon a plea to the jurisdiction be against the accused, the judgment, in case of treason or felony, is that he answer over to the treason or felony; in case of misdemeanor, no such judgment is of right demandable after the plea is decided against him upon an issue in fact, and final judgment may be awarded: Provided that, in the discretion of the Court (*t*), he may still be

admitted to plead "not guilty." But if, in case of misdemeanor, the plea be decided against him upon any demurrer by him to the replication or any subsequent plea by the prosecutor, or any demurrer by the prosecutor to the plea to the jurisdiction, or any subsequent plea by the accused, the judgment shall be to answer over. If the plea be decided for the accused, the judgment, whether in case of treason, felony, or misdemeanor, is, that he go thereof without day. (*s*)

(*r*) It may be questionable whether he should not be allowed to do this of right, now that it is proposed to abolish the distinction between felonies and misdemeanors, except for the purpose of classification.

(*s*) 1 Chitty's C. L. 439; 6 East, 602.

ART. 17.

Plea of abatement.

A plea in abatement praying that the indictment or information may be quashed may be pleaded by the accused, on the ground of some defect apparent on the face of the record or of some matter of fact extrinsic of the record which renders such indictment or information insufficient; and where pleaded must be pleaded previously to any plea in bar. (*t*)

(*t*) 4 Black. Comm. 334; Chitty's C. L. 445.

ART. 18.

In the case of treason or felony, a plea in abatement may be by word of mouth (*u*); in the case of a misdemeanor, it must be in writing, on parchment or paper.

(*u*) Fost. 105; 1 Leach, 476; 1 Ch. C. L. 448.

ART. 19.

Every plea in abatement should be verified by affidavit. (*x*)

(*x*) 1 Chitty's C. L. 448. But this does not appear to be necessary on a trial at bar for high treason. See Haw. P. C. b. 2. c. 34, s. 7; 3 Burr. 1617; Fost. 16. We are not aware of any reason for this distinction, and have, therefore, made the rule general. We have for the like reason omitted Art. 18 of this Section of the Act of Procedure, which provides that "A plea in abatement to an indictment for treason is to be signed by counsel." (*)

(*) 6 Harg. St. Tr. 257–8, 241–2.

ART. 20.

A plea in abatement is to conclude by praying judgment of the indictment or information, and that it may be quashed. (*y*)

(*y*) 10 East. 83.

ART. 21.

The prosecutor may, on behalf of the Crown, take issue upon, or demur, or reply matter of fact to, a plea in abatement.

ART. 22.

Where the prosecutor does as in the last preceding Article is mentioned, the accused is bound to join in demurrer, or rejoin immediately, unless the court in its discretion shall allow further time for that purpose as hereinafter in Article 110 of this Section is mentioned. (*z*)

(*z*) 6 Harg. St. Tr. 238. By the present law this rule is confined to cases of treason and felony, but we see no reason why it should not be extended to misdemeanors.

ART. 23.

On issue joined on a plea in abatement, a trial may be had by a jury of the county, division or other district within the jurisdiction of the Court, (*a*), either immediately or afterwards at the discretion of the court.

(*a*) 2 Hale, 238; 2 Leach, 478; 22 Hen. VIII. c. 14; 28 Hen. VIII. c. 1; 32 Hen. VIII. c. 3; 3 Inst. 27; Starkie, C. P. 296.

ART. 24.

A plea in abatement on the ground that the accused is a peer must show that he is a peer of the United Kingdom, and in what way he derives his title. (*b*)

(*b*) R. *v.* Cooke, 2 B. & C. 871; 4 D. & R. 592.

ART. 25.

On a plea in abatement on the ground that the accused is a peer by writ or patent, the issue is to be tried by the record or patent. (*c*)

(*c*) 1 Chitty's C. L. 450; R. *v.* Cooke, 2 B. & C. 874.

ART. 26.

On a plea in abatement on the ground that the accused is a peer by descent or a peeress by marriage, the issue is to be tried by a jury. (*d*)

(*d*) 2 Hale, 240; 6 Co. 53 *a*; 1 Chitty's C. L. 450; 2 B. & C. 874.

ART 27.

Misnomer.

No indictment or information shall be abated by reason of any dilatory plea of misnomer, or want of addition, or of wrong addition of the party offering such plea, if the Court shall be satisfied, by affidavit or otherwise, of the truth of such plea: in such case the Court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon such party to plead thereto, and shall proceed as if no such plea had been pleaded. (*e*)

(*e*) 7 Geo. IV. c. 64, s. 19.

ART. 28.

Judgment.

If a plea in abatement be found against the accused, the judgment, in case of treason or felony, is that he answer over to the treason or felony: in case of misdemeanor no such judgment is of right demandable after the plea is found against him upon an issue in fact, and final judgment may be awarded: Provided that in the discretion of the Court (*f*), he may still be admitted to plead "not guilty." But if, in case of misdemeanor, the plea be decided against him upon any demurrer by him to the replication, or any subsequent plea by the prosecutor, or any demurrer by the prosecutor to the plea in abatement, or any subsequent plea by the accused, the judgment shall be to answer over. If the plea be found for the accused, the judgment, whether in case of treason, felony, or misdemeanor, is that he be not compelled to answer, but depart the Court without day. (*g*)

(*f*) By the present law, if a plea in abatement be found against the accused, in case of misdemeanor, upon an issue in fact, the judgment is final; but it appears to us, now that it is proposed to abolish the distinction between felonies and misdemeanors, except for the purpose of classification, and since even by the present law many misdemeanors are punishable more severely than some felonies, it would be more humane to give the Court the power, as in the case of pleas to the jurisdiction, of allowing the accused to plead over. It may be questionable whether he should not be entitled to do so of right as in cases of felony.

(*g*) 2 Hale's P. C. 238; 10 East, 88; 1 Chitty's C. L. 450, 451.

ART. 29.

Demurrer.

The accused may demur to the indictment or information, alleging it to be insufficient in law.

ART. 30.

In the case of treason or felony, a demurrer may be by word of mouth; in the case of a misdemeanor it must be in writing on parchment or paper. (*h*)

(*h*) 1 Chitt. C. L. 440.

ART. 31.

A person charged with treason or felony may demur, and plead over to the facts of an indictment at the same time. (*i*)

(*i*) R. *v.* Adams, 1 C. & M. 299. R. *v.* Phelps, 1 C. & M. 180.

ART. 32.

Where a person charged with any offence (*k*) has pleaded to an indictment, the Court may nevertheless, in its discretion, permit him to demur, before the evidence is gone into. (*l*)

(*k*) By the present law, in the case of misdemeanors, the defendant can only demur after pleading, on leave granted to enter a *retraxit*, which is not necessary in cases of felony; but we recommend that the law, in cases of misdemeanor, should be made the same as in cases of felony, now that it is proposed to retain the distinction between felonies and misdemeanors for the purpose of classification only. In the case of felonies, also, the rule contained in the above Article is, by the present law, only applicable where the accused has pleaded in the absence of his counsel. We recommend that the Court should have a discretion in such cases, whether the counsel of the accused be present or absent.

(*l*) R. *v.* Purchase, 1 C. and M. 617.

ART. 33.

A demurrer, when filed, is not to be withdrawn without the permission of the Court. (*m*)

(*m*) 1 Chitty's C. L. 440.

ART. 34.

The prosecutor, on the part of the Crown, may join in the demurrer immediately, or according to the course and practice of the Court. (*n*)

(*n*) See 1 Chitty's C. L. 440.

ART. 35.

No demurrer shall be allowed on account of the omission or misstatement of the accused's name or addition. (*o*)

(*o*) This has been doubted; see 1 Chitty's C. L. 439. But it seems that the plea in abatement was the proper remedy before the statute.

ART. 36.

Upon demurrer the validity of the whole of the proceedings on the record is put in issue. (*p*)

(*p*) If it appear, from the caption of an indictment removed from an inferior Court, that the Court had no jurisdiction, it will be invalid. 1 T. R. 316; Andr. 137–8; 1 Chitty's C. L. 440.

ART. 37.

On demurrer to an indictment found in an inferior Court, objections may be taken to the jurisdiction of the Court, as well as to the subject matter of the indictment. (*q*).

(*q*) R. *v.* Fearnley, 1 T. R. 316.

ART. 38.

If, on objection taken by demurrer, an error appear in an earlier stage of the proceedings than that at which such objection is taken, judgment is to be given against the party who committed the first error. (*r*)

(*r*) 1 M. & S. 190; 1 Chitty's C. L. 443.

ART. 39.

If an indictment contain more than one distinct charge, and, on demurrer, one of the charges demurred to shall appear to be insufficient, but another of them to be sufficient, judgment is to be given for the Crown as to the offence sufficiently alleged.

ART. 40.

On demurrer to an information, the record is amendable by the direction of a judge. (*s*)

(*s*) 4 T. R. 458.

ART. 41.

Judgment.

If a demurrer be decided against the accused, the judgment, in case of treason or felony, is that he answer over to the treason or felony: (*t*) in case of misdemeanor, no such judgment is of right demandable after a demurrer has been decided against him, and final judgment may be awarded: (*u*) Provided that, in the discretion of the Court, he may still be admitted to plead "not guilty." (*v*) If a demurrer be decided for the accused, the judgment is that he be dismissed and discharged of the premises, and go thereof without day.

(*t*) 1 Chitty's C. L. 441–443; 4 Black. Comm. 334; Fost. 21; 8 East, 112; 2 Leach, 603; 2 Hale, 225, 257; 1 M. & S. 184.
(*u*) 1 Chitty's C. L. 442.
(*v*) R. *v.* Birmingham and Gloucester Railway Comp. 3 Q. B. R. 223.

ART. 42.

Special pleas in bar.

The accused may plead a previous acquittal, conviction, attainder, or pardon, of the same offence in respect of which he is arraigned, in bar of the indictment or information.

ART. 43.

The accused may plead as many of the pleas mentioned in the last preceding Article as he thinks fit, provided they be not repugnant to each other. (*w*)

(*w*) Haw. P. C. b. 2, c. 23, ss. 128–137. See Ashford *v.* Thornton, 1 B. & Ald. 423. By the present law it is otherwise in case of misdemeanors, where the judgment is final. R. *v.* Taylor, 3 B. & C. 502; but we recommend that this distinction should no longer exist now that it is proposed to retain the distinction between felonies and misdemeanors for the purpose of classification only.

ART. 44.

Plea of autrefoits acquit, when an acquittal a bar to another prosecution.

An acquittal on a sufficient indictment or information before a Court of competent jurisdiction is a bar to another prosecution for the same offence, and that notwithstanding error in the process on such indictment or information. (*x*)

(*x*) 2 Hale, 248; Hawk. P. C. b. 2, c. 35, s. 8.

ART. 45.

The acquittal intended by the last preceding Article is an acquittal by the verdict of a petit jury on the plea of "not guilty." (*y*)

(*y*) 2 Hale, 243, 246; Hawk. P. C. b. 2, c. 35. s. 6.

ART. 46.

The rule contained in Article 44 of this Section extends to all cases where the accused might on the first indictment or information have been convicted of the

offence charged in the second indictment or information, or of any offence included in that charged in the second indictment or information. (*z*)

(*z*) As where the first charges the murder of A. and the second the manslaughter of A., for the acquittal of the murder includes an acquittal of the manslaughter, so if being first indicted for the manslaughter he is afterwards charged with the murder, for not being guilty of the manslaughter he cannot be guilty of the same fact with additions, 4 Co. 45–6; Fost. 329; 2 Hale, 246. See R. *v.* Vandercomb and Abbott, 2 Leach's C. C. L. 708; 2 East's P. C. 519; R. *v.* Taylor, 3 B. & C. 502, although the former indictment was against the prisoner and others, the second against the prisoner alone, R. *v.* Dann. R. & M. C. C. 424.

ART. 47.

Proviso.

Provided that nothing in the last preceding Article contained shall extend to include any case where the accused, having been acquitted on the first indictment or information owing to a variance between the name of the person on or with respect to whom or whose property the offence was charged to have been committed as stated in such indictment or information, and the name of such person as appearing from the evidence upon the trial thereof, and by which he is described in the second indictment or information, might nevertheless have been convicted upon such first indictment or information, in consequence of such person's being as well known by the one name as the other; but in such case such acquittal shall be no bar to such second indictment or information. (*a*)

(*a*) We have introduced this Article in consequence of the decision in the case of R. *v.* Sheen, 2 Car & P. 634.

ART. 48.

Compassing to levy war against the Queen, &c.; inciting to mutiny; administering, &c., oaths for any seditious purpose, or to bind persons to commit any capital felony.

An acquittal on an indictment for any offence mentioned in any of the following Articles of the Act of Crimes and Punishments, viz.:—Article ( ) (*b*) of Section 3, Article 1 of Section 7, and Article 1 of Section 11 of Chapter II., and Articles 22 and 23 of Chapter VI., is a bar to an indictment charging the same offence or facts as treason or misprision of treason. (*c*)

(*b*) See 11 and 12 Vic. c. 12, s. 7. This Act reduces certain treasons to felony, and having been passed since the making of the Report which contains the Act of Crimes and Punishments, that Act has no Article on the subject.

(*c*) See 37 Geo. III. cc. 70 and 123; 52 Geo. III. c. 104; and 57 Geo. III. c. 7.

ART. 49.

Obtaining by false pretences.

An acquittal on any indictment for any offence against Section 2 of Chap. XVIII. of the Act Crimes and Punishments, is a bar to an indictment charging the same facts as theft. (*d*)

(*d*) 7 and 8 Geo. IV., c. 29, s. 53, in part.

ART. 50.

When an acquittal not a bar to another prosecution.

An acquittal is not a bar where the indictment or information is insufficient, although such acquittal be, by the judgment of the Court upon a special verdict found by a petit jury. (*e*)

(*e*) 3 Inst. 314; 2 Hale's P. C. 248, 395; 4 Co. 44–5. Qy. as to this: Lord Hale intimates an opinion that, if the entry on the first indictment be *quod sit inde quietus et eat sine die*, he cannot, whilst the judgment stands, be again indicted. 2 Hale's P. C. 394; see Starkie on Crim. Pl. 1st ed. 302.

ART. 51.

An acquittal on an indictment for a burglary with a felony alleged is no bar to an indictment for a burglary laid with intent only to commit a felony. (*f*)

(*f*) 2 Leach, 716; Haw. P. C. b. 2, c. 35, s. 5; 1 Chitty's C. L. 456.

ART. 52.

An acquittal on an indictment for a theft in one county is no bar to an indictment for a theft in respect of the same goods in another county. (*g*)

(*g*) 2 Hale, 245; Haw. P. C. b. 2, c. 35, s. 4. For the acquittal merely shows that the goods were not brought into the first county.

ART. 53.

An acquittal on an indictment for stealing one moveable thing is no bar to an indictment for stealing another moveable thing, although it appear that both were taken by the same act. (*h*)

(*h*) 2 Hale, 246.

ART. 54.

The acquittal of a person indicted as an accessory, is no bar to an indictment charging him as a principal in respect of the same offence. (*i*)

(*i*) See the note to Article 16 of Section 2 of Chapter II.

ART. 55.

The plea of a previous acquittal is pleadable as to part of the charge contained in the second indictment or information. (*k*)

(*k*) 2 M. and Ro. 26; 2 Lewin's C. C. 52.

ART. 56.

The plea of a previous acquittal may be in writing, upon parchment or paper, or by word of mouth; in the latter case it is to be taken down by the clerk of the arraigns or other person acting as such officer, and put upon parchment. (*l*)

(*l*) 1 Chitty's C. L. 461; R. *v.* Bowman, 6 C. and P. 337.

ART. 57.

Every plea of a previous acquittal shall show by voucher of the record and proper averments, an acquittal by the judgment of a Court of competent jurisdiction of the accused from a charge on which he might have been convicted, and on which judgment might have been pronounced against him on conviction, and which is either the same charge in law and in fact with that to which he pleads, or which in law and in fact involves the same charge, or which in law and in fact is a substantive offence essential to the charge to which he pleads.

ART. 58.

The substance of the record of the former indictment or information and acquittal must be set forth on the plea. (*m*)

(*m*) 1 M. and S. 183; 9 East, 438; 2 Hale, 241, 243–255; 2 Leach, C. C. L. 712.

ART. 59.

All immaterial variances between the former indictment or information and the indictment or information to which the plea of a previous acquittal is pleaded, are reconcilable by averments in such plea. (*n*)

(*n*) As to time, Keil 58; 9 East, 437; 2 Hale, 224—7; Haw. P. C. b. 2, c. 35. So if one be charged with killing a person and afterwards charged with killing the same person described by a different name, he may show that such person was known by both names. 2 Hale, 244–5; Haw. P. C. b. 2, c. 35, s. 3. So as to place, 2 Hale, 245.

ART. 60.

The plea of a previous acquittal is to conclude with a verification and prayer that the accused may be dismissed the Court without further day. (*o*)

(*o*) 2 Hale, 392. 241, 243, 255; 2 Leach, 715; 1 Chitty's C. L. 460; 2 Leach, C. C. L. 712.

ART. 61.

The prosecutor, on the part of the Crown, may take issue upon or demur to a plea of a previous acquittal, or may reply that there is not any record of the acquittal alleged in such plea. (*p*)

(*p*) 2 Hale, 255.

ART. 62.

Where the prosecutor does as in the last preceding Article is mentioned, the accused is bound to join in demurrer or rejoin immediately.

ART. 63.

The replication on the part of the Crown to a plea of a former acquittal may be in writing or by word of mouth; and the rule contained in Article 56 of this Section applies as well to such replication as to a plea of a previous acquittal. (*q*)

(*q*) R. *v.* Sheen, 2 C. and P. 634; but see Vandercomb and Abbott, 2 Leach, 715 (note).

ART. 64.

On issue taken on a plea of a previous acquittal, a trial may be had by a jury of the county, division, or other district within the jurisdiction of the Court, either immediately or afterwards, at the discretion of the Court. (*r*)

(*r*) 1 Chitt. C. L. 461.

ART. 65.

No issue is to be taken on the replication that there is not any record of the acquittal alleged in a plea of a previous acquittal, but oyer may be demanded on the part of the Crown. (*s*)

(*s*) 2 Hale's P. C. 255.

ART. 66.

Where the accused is to be tried in the Court of Queen's Bench, and the record of acquittal is of another Court, such record is removable into the former Court by writ of *certiorari*. (*t*)

(*t*) 2 Hale, 242, 255; Haw. P. C. b. 2, c. 35, s. 2.

ART. 67.

Where the accused is to be tried in any Court other than the Court of Queen's Bench, the tenor of the record of acquittal is to be removed into Chancery, and sent to the Court where the indictment is pending. (*u*)

(*u*) 2 Hale, 242–255.

ART. 68.

Plea of autrefoits convict, and autrefoits attaint.

Every plea of a previous conviction or attainder must show by voucher of the record and proper averments, a conviction or attainder respectively by the judgment of a Court of competent jurisdiction of the accused for the same offence in fact and in law with that charged in the indictment or information to which such plea is respectively pleaded, or for any offence involving the same offence in fact and in law with that charged in the indictment or information to which such plea is respectively pleaded. (*x*)

(*x*) 2 Hale, P. C. 251; 4 Co. 394; R. *v.* Vandercomb, 2 East's P. C. 519; 7 and 8 Geo. IV. c. 28, s. 4.

ART. 69.

The conviction of a person indicted as an accessory is a bar to an indictment charging him as a principal in respect of the same offence, and the conviction of a party indicted as a principal is a bar to an indictment charging him as an accessory to the same offence. (*y*)

(*y*) See the note to Article 16 of Section 2 of Chapter II.

ART. 70.

The rules contained in Articles 48, 49, 55, 56, 58, 59, 60, 61, 62, 63, 64, 65, 66, and 67 of this Section shall apply as well to a plea of a previous conviction or attainder as to a plea of a previous acquittal.

ART. 71.

Autrefoits acquit, convict, and attaint.

The Court will at discretion grant time to enable the accused to obtain the means of proof, and to draw up his plea of a previous acquittal, conviction, or attainder in a proper and formal shape (*z*), and for the latter purpose will direct the indictment to be read over so that its contents may be taken down. (*a*)

(*z*) R. *v.* Chamberlain, 6 C. and P. 93; R. *v.* Bowman, 6 C. and P. 101; R. *v.* Justices of Middlesex, 5 B. and Ad. 1113.

(*a*) R. *v.* Parry, 7 C. and P. 836; 2 Moody's C. C. 9.

ART. 72.

Plea of pardon.

Where the accused has, before pleading, received a pardon, he must, except as in the next succeeding Article is mentioned, if he intend to avail himself of it, plead it in bar of the indictment or information; he is estopped from doing so after he has pleaded "not guilty." (*b*)

(*b*) Fost. 43; Hawk. P. C. b. 2, c. 37, s. 57; Back. Abrd. "Pardon," G. 2; 4 Black. Comm. 402.

ART. 73.

Provided that notwithstanding the last preceding or any other Article of this Act, the benefit of a general pardon may be allowed, although such pardon be not pleaded in proper time. (*c*)

(*c*) R. *v.* Harris, 1 Leach's C. C. 40.

ART. 74.

A pardon may be either by Act of Parliament or under the great seal, or by warrant under Her Majesty's royal sign manual countersigned by one of the principal Secretaries of State. (*d*)

(*d*) 2 Inst. 233; 1 Show. 284; Chitty's Burn's Just. tit. "Pardon;" Steph. C. L. 334, 335; 7 and 8 Geo. IV. c. 28, s. 13. By 27 Hen. VIII. c. 24, it is declared that no other person but the king shall have power to pardon or remit any treason or felony whatever.

ART. 75.

Pardon.

The Queen may pardon for any offence contained in the Act of Crimes and Punishments except the offence of sending as prisoner or transporting of British

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subjects beyond the seas punishable under Article 35 of Section 7 of Chap. XV. of that Act, (*e*) and any offence declared to be a common nuisance by Chap. XIII. of that Act, so long as such offence remains unredressed or so as to prevent an abatement of it; but, in the case of a nuisance, she may afterwards remit the fine. (*f*)

(*e*) 31 Car. II. c. 2, s. 12.

(*f*) Hawk. P. C. b. 2, c. 37, s. 33; 4 Black. Comm. 398; Chitty's Burn's Just. tit. "Pardon."

ART. 76.

Provided that the Queen cannot pardon for any offence before it be committed; and such pardon is void. (*g*)

(*g*) Hawk. P. C. a. 2, c. 37, s. 28; Chitty's Burn's Just. tit. "Pardon."

We agree with the former Commissioners in recommending the repeal of the 13th Rich. II. stat. 2, c. 1, the provisions of which are contained in Article 74 of Section 2 of Chapter V. of the Act of Procedure, and are as follows:—

"ART. 74.

"No charter of pardon shall be allowed before any justice for murder, or for the death of a man "slain by await, assault, or malice prepensed, treason, or rape of a woman, unless the same murder, "death of the man slain by await, assault, or malice prepensed, treason, or rape of a woman be "specified in the same charter. And if a charter of the death of a man be alleged before any justices, "in which charter it is not specified that he of whose death any person is arraigned was murdered or "slain by await, assault, or malice prepensed, the same justices shall inquire by a good inquest of the "*visne* where the dead was slain, if he were murdered or slain by await, assault, or malice prepensed, "and if they find that he was murdered or slain by await, assault, or malice prepensed, the charter "shall be disallowed, and further it shall be done as the law commandeth."

See, also, Barrington's Treatise on Ancient Statutes.

ART. 77.

When a pardon under the great seal is pleaded, a profert must be made of the letters patent. (*h*)

(*h*) 1 Chitty's C. L. 468.

ART. 78.

Where a public Act pardons all persons with regard to particular offences, the Court will take notice of the Act, although the pardon be not pleaded. (*i*).

(*i*) 1 Chitty's C. L. 466; Hawk. P. C. b. 2, c. 37, s. 61; 3 Inst. 234; 1 Dyer, 26; Plowd. 83; Fost. 43.

ART. 79.

Where the pardon is personal to the accused, or he is included in a general Act of grace, the privilege is to be pleaded. (*k*)

(*k*) 1 Chitty's C. L. 466.

ART. 80.

If the enacting clause of an Act of pardon contain an exception of particular persons by name, or of all persons who come under some general description stated in such Act, a person claiming the benefit of the Act must show that he is not included within such exception. (*l*)

(*l*) Hawk. P. C. b. 2, c. 37, s. 60; Bac. Ab. "Pardon," G. 1; 3 East, 87; Cro. Eliz. 125; 1 Chitty's C. L. 467.

ART. 81.

It is otherwise where the pardon in the body of the Act is general, and any such exception as is mentioned in the last preceding Article is contained in a distinct proviso. (*m*)

(*m*) 1 Lev. 26; Hawk. P. C. b. 2, c. 17, s. 60; Bac. Ab. "Pardon," G. 1.

ART. 82.

Where particular offences are excepted in an Act of pardon, it is not necessary to negative their commission. (*n*)

(*n*) Hawk. P. C. b. 2, c. 37; Bac. Ab. "Pardon," G. 1; 1 Chitty's C. L. 467; Roy. 99; Cro. Cra. 449.

ART. 83.

So if an Act of pardon contains an exception of a single individual, it is not necessary that a party claiming the benefit of such Act should show that he is not that individual. (*o*)

(*o*) Hawk. P. C. b. 2, c. 37, s. 63; Bac. Ab. "Pardon," G. 1; Cro. Eliz. 125.

ART. 84.

A pardon for all felonies, misdemeanors, and other things, is available upon a charge of murder or extenuated homicide, where the cause of death occurs before the time to which the pardon applies, although the death does not happen until after that time. (*p*)

(*p*) Hawk. P. C. b. 2, c. 37, s. 21; Bac. Ab. "Pardon," D; 1 Hale, 426; Plowd. 404.

ART. 85.

A pardon for misdemeanors only is not available upon a charge of murder or extenuated homicide, where the cause of death occurs before the time to which the pardon applies, but where the death does not happen until after that time. (*q*)

(*q*) Fost. 64; Bac. Ab. "Pardon," D.

ART. 86.

A pardon for an offence included in any other offence charged in any indictment or information is pleadable in bar as to such former offence; and the person indicted or informed against may plead that he is not guilty as to the rest. (*r*)

(*r*) 2 Hale, 258.

ART. 87.

A variance as to the description of the person pardoned may be reconciled by proper averments of his identity. (*s*)

(*s*) Hawk. P. C. b. 2, c. 37, s. 66; Bac. Ab. "Pardon," G. 2; 1 Dyer, 34 *a*.

ART. 88.

Variances as to the circumstances of the offence which could not have been material on the trial are reconcilable by averments. (*t*)

(*t*) Hawk. P. C. b. 2, c. 37, s. 66; Bac. Ab. "Pardon," G. 2.

ART. 89.

A plea of pardon is to conclude by praying that the accused may be dismissed and discharged of the premises by the Court. (*u*)

(*u*) 2 Hale, 391; 1 Chitty's C. L. 469.

ART. 90.

A pardon on an indictment for a misdemeanor in the Court of Queen's Bench [or on a criminal information], may be pleaded by attorney. (*x*)

(*x*) 2 Str. 816.

ART. 91.

A direction under Her Majesty's sign manual or the privy seal, signifying Her Majesty's intention to pardon any person, and directing the justices of gaol delivery to bail him on his entering into a recognizance to appear and plead the next general pardon that shall come out, shall be a sufficient authority to such justices, upon taking his recognizance as directed, and also security for the performance of the condition on which pardon is intended to be granted, where it is conditional, to issue their warrant (*y*) for the discharge of such person. (*z*)

(*y*) See the form, 15 East, 463; Hawk. P. C. b. 2, c. 37, s. 72; Bac. Ab. "Pardon," G. 2; 1 Bl. R. 479; 2 Bl. R. 797.

(*z*) We recommend the repeal of the 5 W & M. c. 13, s. 2, the provisions of which are embodied in Article 89 of Section 2 of Chapter V. of the Act of Procedure, for the reasons suggested by the former Commissioners. That Article is as follows:—

"ART. 89.

"If any charter of pardon be pleaded by any person for any felony, the justices before whom such "pardon shall be pleaded may at their discretion remand or commit such person to prison, there to remain "until he shall enter into a recognizance with two sufficient sureties for his being of good behaviour for "any time not exceeding seven years; provided that if any such charter of pardon be pleaded by a feme "covert or infant, such feme covert or infant may find two sufficient sureties, who shall enter into a "recognizance for him or her being of good behaviour, as is aforesaid."

ART. 92.

Special pleas.

The pleas of a previous acquittal, conviction or attainder and the plea of a pardon are the only pleas which are allowed to be pleaded specially in bar of an indictment for treason or felony; (*a*) and no defence need be pleaded specially to an indictment or information for a misdemeanor, which amounts merely to a denial of that which the prosecutor would be bound to prove. (*b*)

(*a*) 2 Hale, 258, 304; Trem. P. C. 270.

(*b*) 1 Chitty's C. L. 472; see 6 Mod. 172; Trem. P. C. 270; Bac. Ab. tit. "Assault and Battery."

ART. 93.

Special pleas to indictments for non-repair of bridges and highways.

But a special plea to an indictment for the non-repair of a bridge or highway which denies the defendants' liability to repair the same (such liability not being of common right), must show who is liable, and the ground of such liability, and traverse the defendants' liability; (*c*) although the matter needed not to have been pleaded. (*d*)

(*c*) 2 Saund. 159, n. 10.
(*d*) 2 Saund. 159, a. n. 10.

ART. 94.

And where defendants deny a liability to repair a bridge or highway, such liability being (*e*) of common right, they must, unless they are relieved from such liability by a public statute, show by their plea how they are relieved from it.

(*e*) 3 Camp. 222.

ART. 95.

The plea in the case mentioned in the last preceding Article, must show who is liable, and the reason of such liability, and must not conclude with a traverse of the defendants' liability. (*f*)

(*f*) 1 Sid. 140; Carth. 213; 1 Chitty's C. L. 477. For it is a traverse of matter of law which cannot be referred to a jury; 1 Saund. 23, n. 5; 2 Saund. 159, a. n. 10; 2 H. B. 182; 2 Lev. 112.

ART. 96.

Where the liability pleaded arises merely from inhabitancy, the reason on which it is founded must be set forth in the plea. (*g*)

(*g*) 5 Burr. 2700; 2 T. R. 111; 3 Reb. 301.

ART. 97.

Where the inhabitants of a parish at large are indicted for the non-repair of a road, the inhabitants of the different divisions of such parish, being liable by prescription to repair the roads within their own divisions, which roads would otherwise, and of common right have been maintainable by the parish at large, such prescription is to be pleaded. (*h*)

(*h*) 2 Saund. 159. a. n. 10; Peake's R. 219.

ART. 98.

Provided that where such prescription as in the last preceding Article is mentioned shall not have been pleaded to an indictment against the inhabitants at large for the non-repair of a road, then, notwithstanding judgment against such parish, if any divisions of the same can show that such judgment was obtained by fraud or surprise, and without their having had notice of such indictment, they may, with leave of the Court, be admitted to plead such prescription to a second indictment. (*i*)

(*i*) 2 Saund. 159, a. n. 10; Doug. 421; 1 Chitty's C. L. 476.

ART. 99.

Where a party liable to a public burthen has been convicted, the inhabitants of a county or parish, who are liable of common right, may plead the conviction with proper averments as to identity. (*k*)

(*k*) Sir T. Ray, 385; Trem. P. C. 206.

ART. 100.

Plea in personal libels.

On the trial of any indictment or information for a personal libel, the defendant having pleaded such plea as is hereinafter in this Article mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that such matters should be published; and to entitle the defendant to give evidence of the truth of such matters as a defence to such indictment or information, it shall be necessary for the defendant in pleading to such indictment or information, to allege the truth of such matters in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that such matters should be published, and the particular fact or facts by reason whereof it was for the public benefit that such matters should be published, to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof: and if after such plea the defendant shall be convicted on such indictment or information, it shall be competent to the Court, in pronouncing sentence, to consider whether the guilt of the defendant is

aggravated or mitigated by such plea, and by the evidence given to prove, or to disprove the same: Provided that the truth of the matters charged in the alleged libel complained of by such indictment or information shall in no case be inquired into without such plea of justification: Provided also, that in addition to such plea, it shall be competent to the defendant to plead a plea of not guilty: Provided also, that nothing in this Article contained shall take away or prejudice any defence, under the plea of not guilty, which it is now competent to the defendant to make under such plea to any action, or indictment, or information, for defamatory words or libel. (*l*)

(*l*) 6 & 7 Vic. c. 96, s. 6.

ART. 101.

Judgment.

If a plea of a previous acquittal, conviction or attainder, or of a pardon or other special matter in bar, be found against the accused, the judgment in case of treason or felony, is that he answer over to the treason or felony: in case of a misdemeanor, no such judgment is of right demandable after such a plea is found against him upon an issue in fact, and final judgment may be awarded: Provided that in the discretion of the Court (*m*) he may still be admitted to plead "not guilty." But if, in case of misdemeanor, any such plea be decided against him upon any demurrer by him to the replication, or any subsequent plea by the prosecutor, or any demurrer by the prosecutor to any such plea by the accused, or to any subsequent plea by the accused, the judgment shall be to answer over. If a plea of a previous acquittal, conviction or attainder, or of a pardon or other special matter in bar be found for the accused, the judgment, whether in case of treason, felony or misdemeanor is that he be discharged of the premises and go thereof without day. (*n*)

(*m*) By the present law, judgment in case of misdemeanor, if any such plea be found against the accused, is final, 2 Hale, 256; but for the reasons given in the note to Article 28 of this Section, we recommend that the Court in its discretion should have power to admit him to plead over "not guilty."

(*n*) 2 Hale, 391.

ART. 102.

Judgment by default.

If in case of any plea to the jurisdiction, or in abatement, or of any special plea in bar or demurrer, the prosecutor or defendant respectively do not by replication, rejoinder, or otherwise, answer such previous plea, or join in demurrer, according to the course and practice of the Court, judgment against the party so making default is to be signed, entered, or pronounced, according to the course and practice of the Court. (*o*)

(*o*) Corner's P. 177.

ART. 103.

Plea of not guilty.

The plea of "not guilty" to an indictment or information puts the whole charge in issue. (*p*)

(*p*) 4 Com. 338; 1 Chitty's C. L. 471.

ART. 104.

Upon a plea of "not guilty" to an indictment or information, no replication or similiter on the record shall be deemed necessary. (*q*)

(*q*) The entry of cul-prit, which is usually made as a memorandum on the record, has been understood to signify that the prosecutor for the Crown is ready to produce his charge. In capital cases the entry of a replication or similiter on the record has been held to be unnecessary. See the authority cited 1 Chitty's C. L. 416; and there seems to be no greater reason for it in any other case of felony. We also recommend that it should no longer be necessary in case of misdemeanor. The want of a similiter is already cured after verdict by the 7 Geo. IV. c. 4. s. 21. If this recommendation be adopted, it will render unnecessary Article 112 of Section 2, of Chap. V. of the Act of Precedure, which Article is as follows:—"On indictments for misdemeanors, the similiter is added in the Queen's Bench "by the Queen's coroner; at the assizes by the clerks of assize; at the sessions by the clerks of the "peace, and it may in general be added in the name of any one who prosecutes for the Queen. If by "mistake the similiter be omitted, the Court may order it to be interlined."

ART. 105.

The accused may plead "not guilty" as to part of a charge, and either confess or plead special matter in bar as to the remainder. (*r*)

(*r*) 1 Chitty's C. L. 472–3.

ART. 106.

A party not having privilege of peerage, who being arraigned for treason or

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felony (*s*) shall plead "not guilty," shall be deemed to have put himself upon the country for trial, and the Court shall thereupon order a jury for trial. (*t*)

(*s*) The words of the Act are "felony or piracy;" but piracy is a felony by definition. See Act of Crimes and Punishments, c. 1.

(*t*) 7 and 8 Geo. IV. c. 28, s. 1.

ART. 107.

If a person upon being arraigned stand mute of malice, or will not answer directly to the indictment or information upon which he is arraigned, it shall be lawful for the Court, if it shall so think fit, to order the proper officer to enter the plea of "not guilty" on behalf of such person, and the plea so entered shall have the same force and effect as if such person had actually pleaded the same. (*u*)

(*u*) 7 and 8 Geo. IV. c. 28, s. 2.

ART. 108.

Delivery of a copy of the indictment in the Queen's Bench.

If a person, either by virtue of a writ of *capias ad respondendum* issued out of the Court of Queen's Bench, or by virtue of any warrant of commitment, as in Article 16 of Section 2, or Article 2 of Section 3, of Chapter III. of this Act is mentioned, shall be committed to and detained in any gaol for want of bail, it shall be lawful for the prosecutor of such indictment or information to cause a copy thereof to be delivered to such person, or to the gaoler, keeper, or turnkey of the gaol wherein such person shall be detained, with a notice thereon indorsed, that unless such person shall within eight days from the time of such delivery of a copy of such indictment or information cause an appearance, and also a plea or demurrer, to be entered in such Court to such indictment or information an appearance and the plea of not guilty will be entered thereto in the name of such person; and in case he shall thereupon for such space of eight days after such delivery of a copy of such indictment or information neglect to cause an appearance, and also a plea or demurrer to be entered in such Court to such indictment or information, it shall be lawful for the prosecutor of such indictment or information, upon an affidavit being made and filed in such Court of the delivery of a copy of such indictment or information, with such notice indorsed thereon to such person or to such gaoler, keeper or turnkey, as the case may be, which affidavit may be made before any judge or commissioner of such Court authorized to take affidavits in such Court, to cause an appearance and the plea of not guilty to be entered in such Court to such indictment or information for such person, and such proceedings shall be had thereupon as if the defendant in such indictment or information had appeared and pleaded not guilty according to the usual course of such Court; and if upon the trial of such indictment or information any defendant so committed and detained shall be acquitted of all the offences therein charged upon him, the judge before whom such trial shall be had, although he may not be one of the judges of the Court of Queen's Bench, may order that such defendant shall be forthwith discharged out of custody as to his commitment hereinbefore in this Article mentioned, and such defendant shall be thereupon discharged accordingly. (*x*)

(*x*) 48 Geo. III. c. 58, s. 1, in part. A similar enactment as regards offences against the revenue is contained in the statute 8 and 9 Vic. c. 87, s. 122.

ART. 109.

Delivery of copy of indictment or information on prosecutions by Customs.

Where any person shall be apprehended by virtue of a warrant issued under the provisions of Article 16 of Section 2 of Chapter III. of this Act, in respect of any offence against any Article of the Act of Crimes and Punishments relating to the Customs, and shall enter into a recognizance and appear in the Court of Queen's Bench at the return of such recognizance, but shall not afterwards plead to the indictment or information, it shall be lawful for the prosecutor of such indictment or information to cause a copy thereof to be delivered to such person or to his attorney or agent, or to be left at his last place of abode with a notice thereon indorsed, that unless such person shall within eight days from the time of such delivery of a copy of such indictment or information, cause a plea to be entered in such Court to such indictment or information, the prosecutor of such indictment or information will enter a plea of not guilty on his behalf; and upon affidavit being made and filed in such Court of the delivery of a copy of such indictment or information with such notice indorsed thereon, to such person or to his attorney or agent, or at his last place of abode as the case may be, it shall be lawful for the prosecutor of such indictment or information to cause the plea of not guilty to

be entered in such Court to such indictment or information for such person, and such proceedings shall be had thereupon as if the defendant in such indictment or information had pleaded according to the usual course of such Court. (*y*) Chap. V. Sec. 2.

(*y*) 8 and 9 Vic. c. 87, s. 123.

ART. 110.

Every Court has a discretionary power to allow further time to plead or demur to any charge of an offence within the Act of Crimes and Punishments over which such Court has jurisdiction. Further time to plead.

ART. 111.

Unless it be otherwise specially provided, no more than one plea can be pleaded in answer to any indictment or information.

ART. 112.

Where a great number are indicted for a riot, the prosecutor may, at the discretion of the Court of Queen's Bench, be required to fix upon two or three of the defendants, and to proceed to trial against them, the others entering into a rule that if the defendants who plead are found guilty, they will plead guilty. (*z*). Rule to select to plead, &c.

(*z*) 6 Mod. 212.

ART. 113.

Pleas are amendable generally before they are entered on the record, but not afterwards. (*a*) Pleas, amendment of.

(*a*) Salk. 47; Com. Dig. Amend. c. 2; Chitty's C. L. 436. This appears to be the law, according to the older authorities; but we are informed by Mr. Jones, the Master of the Crown side of the Court of Queen's Bench, that it is contrary to the modern practice.

ART. 114.

Every Court, except as in the next succeeding Article is mentioned, has a discretionary power of allowing any plea or demurrer to be withdrawn. (*b*) Withdrawing of.

(*b*) See several instances collected in Chitty's C. L. 436; and See Foster, 16, 23; 1 Wils. 157. Such an authority seems to be almost necessarily incident to Criminal Courts.

ART. 115.

No Court of Nisi Prius has authority to allow a defendant upon his trial on a record from the Court of Queen's Bench, to withdraw his plea of not guilty, and plead guilty; but a verdict of not guilty may be taken by consent in such Court upon such a trial. (*c*)

(*c*) R. *v.* Barrett, 2 Lewin's C. C. 264.

The following appears to be a mere rule of practice, and as such we have omitted the Article in the Act of Procedure, in which it is contained.

"ART. 119.

"Where the defendant appears at the sessions, and engages by recognizance to try his traverse at a "subsequent sessions, the proceedings are to be entered in the issue or traverse book.* Entry of proceedings when defendant traverses.

"* 1 Leach, 111; 4 East, 175; 8 East, 209; 4 Burr. 2085."

CHAPTER VI. Chap. VI.

OF PROCURING THE ATTENDANCE OF JURORS AND WITNESSES, AND OTHER PROCEEDINGS PRELIMINARY TO TRIAL.

ART. 1.

WHERE the accused pleads "not guilty" to an indictment or information, he is to be tried by a jury of 12 (*a*) men returned in manner hereinafter in this Chapter mentioned. Jury.

(*a*) 2 Bl. 719; and the fact should appear on the record, *ib.* If more than 12 be accidentally sworn, the proceedings will not be avoided. *Semble* 2 Hale, 296; but if the number returned be less than 12, any verdict must be ineffectual, and the judgment will be reversed for error. See 2 Hale, 161; Bac. Ab. Juries A; 1 Chitty's C. L. 505.

ART. 2.

Where the accused is to be tried at bar in the Court of Queen's Bench upon an indictment therein pending or upon a criminal information, the jury is returned under the provisions of the Act passed in the 6th year of the reign of King Trial at bar.

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Geo. IV., mentioned in Article 6 of Section 1 of Chapter II. of this Act, in pursuance of a writ of *venire facias juratores* directed to the sheriff of the county in which the offence is alleged to have been committed, and tested and returnable according to the course and practice of that Court, commanding such sheriff to cause 12 men of his county, qualified according to law, to come before the Queen, to try whether the accused be guilty of such offence. (*b*)

(*b*) Corner's P., 259.

ART. 3.

Trial at Nisi Prius.

Where the accused is to be tried at *nisi prius* upon an indictment pending or information filed in the Court of Queen's Bench, the jury is returned under the provisions of the Act referred to in the last preceding Article, in pursuance of a writ of *venire facias juratores*, directed, tested, and returnable as in that Article mentioned, commanding the sheriff to cause 12 men of his county, qualified according to law, to come before the Queen on a day named in such writ, or before the chief justice or judges of assize, if he or they shall come into such county before that time, to try whether the accused be guilty of the offence alleged against him. (*c*)

(*c*) This alteration will do away with the necessity for the writ of *distringas corpora juratorum*, and so simplify the present mode of proceeding where trials are to be had at nisi prius. A defendant, unless the jury be special, is now always tried, at nisi prius, by a jury empannelled from the list returned to the sessions of nisi prius, in pursuance of the 6 Geo. IV. c. 50 (the Jury Act); on which account it has been suggested by the Criminal Law Commissioners, in their Eighth Report, p. 127, note (*k*), that the writ of *venire* even, as well as the writ of *distringas*, is unnecessary. The insertion of the nisi prius clause in the *venire* will be simply a return to what the law was originally; for by the statute of nisi prius (13 Edw. I., c. 30) it was provided that writs of venire for summoning juries to the superior Courts should be in the following form: "Præcipimus tibi quod venire facias coram justiciariis nostris "apud Westm. in octabis Scti Michaelis, *nisi talis et talis, tali die et loco ad partes illas venerint*, "duodecim., etc."—See Step. on Plead., note 31.

ART. 4.

If the sheriff make no return to any such writ as hereinbefore in this Chapter is mentioned, one or more such writ or writs, as occasion may require, may be respectively issued in succession.

ART. 5.

Several defendants.

If several persons be indicted for the same crime, one writ of *venire facias juratores* may be issued for all, or one for each of them. (*d*)

(*d*) Sir W. Jones, 425; Cro. Car. 531; 2 Hale, 263; Haw. P. C. b. 2, c. 41, s. 8.

ART. 6.

To whom process to be directed.

If the sheriff for the county be an actual party, or be so nearly related to the prosecutor or the accused that he cannot be presumed to be impartial, the writ of *venire facias juratores* is to be directed to the coroners or coroner, as the case may be, for the same county, or to such of such coroners, where more than one, as may be presumed to be impartial, and, in case suspicion of partiality attach to such coroners or coroner, then to two elisors to be chosen by the Court. (*e*)

(*e*) Co. Litt. 158 *a*; Bac. Ab. "Juries," B. 3.

ART. 7.

Provided that where there are two sheriffs for the county to only one of whom suspicion of partiality attaches, the writ of *venire facias juratores* is to be directed to the other of them, and not to the coroners or coroner. (*f*)

(*f*) Haw. P. C., b. 2, c. 9, s. 45; 1 Leach, 101.

ART. 8.

If suspicion of partiality attach to the under sheriff for the county, the writ of *venire facias juratores* may be directed to the high sheriff, with a proviso that such under sheriff shall not interfere (*g*) in its execution.

(*g*) Bac. Ab. "Juries," B. 3.

ART. 9.

Trial before Courts of Oyer and Terminer, Gaol Delivery, or Sessions of the Peace.

For the purpose of trials before Courts of Oyer and Terminer, Gaol Delivery, or Sessions of the Peace, the sheriff of the county for which any such Court shall be holden shall at least ( ) days before the holding thereof summon a competent

number of men named in the jurors' books prepared under the provisions of the Act passed in the 6th year of the reign of King George IV., in Article 6 of Section 1 of Chap. II. of this Act mentioned, so as such number be not less than 48 nor more than 72, unless in the case of Courts of Oyer and Terminer or Gaol Delivery, the senior judge under the commission, or, in the case of Courts of Sessions of the Peace, two justices of the peace for the county, division, or other district, in and for which such Court shall be holden, shall, by order in writing, direct a greater or less number to be so summoned; and such sheriff shall return a panel containing the [Christian names and surnames] (*h*) alphabetically arranged, and the places of abode, and additions of the jurors so summoned at the first day of the session of such Courts respectively; and the jurors so summoned shall serve as jurors at such Courts respectively. (*i*)

(*h*) The words between brackets are borrowed from the Municipal Corporation Act, which requires the Christian and surnames to be stated in jury panels, made out by the clerk of the peace for the trial of offenders in boroughs having separate courts of sessions of the peace. The Jury Act (6 Geo. IV. c. 50), from which the above Article is taken, only requires the *names* to be stated.

(*i*) The present law on the subject of summoning juries before the Courts mentioned in the above Article, is very uncertain. It appears that justices of gaol delivery may have a jury returned without any special precept, in consequence of the precept to the sheriff for the holding of their sessions containing a general commandment to return juries against their coming. But although the precept for the summons of sessions of oyer and terminer and of the peace contain similar commandments, yet according to some opinions juries are not returnable before those Courts without the issuing of a particular precept to the sheriff for that purpose, after issue joined. See Hawk. P. C. b. 2, c. 41. The Jury Act does not affect the process by which the sheriff is required to return juries; but we think it advisable that the sheriff should in all cases return a sufficient number of men to serve as jurors before all criminal courts, without any special precept being necessary for the purpose. In this view we have introduced the above Article.

Art. 10.

Trials at Borough sessions.

Provided that, in boroughs having separate Courts of Sessions of the Peace, the clerk of the peace of every such borough shall, at least ( ) days before the holding of such sessions, cause to be summoned not less than 36 nor more than 60 men qualified and liable to serve upon juries for the trial of issues joined in any Court of Quarter Sessions of the Peace in such borough, to serve as jurors at such Quarter Sessions of the Peace; and such clerk of the peace shall make out a panel of such persons so summoned, and such panel shall contain therein the Christian names and surnames [alphabetically arranged, and the] places of abode, and additions of the several persons therein named. (*k*)

(*k*) 5 and 6 Will. IV. c. 76, s. 121, in part. We have added the words between brackets, as it appears to us that there ought to be no difference between the mode in which jury panels are made out in boroughs having separate courts of sessions of the peace and that required at the assizes and county sessions of the peace.

Art. 11.

Counties palatine.

Where the accused is to be tried in the county palatine of Lancaster or Durham upon an indictment pending or information filed in the Court of Queen's Bench, the jury is returned under the provisions of the Act passed in the 6th year of the reign of King Geo. IV., mentioned in Article 6 of Section 1 of Chapter II. of this Act, in pursuance of a writ of *mittimus* directed to the justices of such county, tested and returnable according to the course and practice of the Court of Queen's Bench, commanding such justices that they proceed to the trial of the issue joined in that Court between the Crown and the accused in such county palatine, according to law and the usage and customs of such county palatine. (*l*)

(*l*) See Corner's P., p. 140; and Arch. P. of Crown Office, pp. 70–75.

Art. 12.

Collateral issues.

Upon issue joined between the Crown and the accused on any matter collateral to the charge contained in the indictment or information, the Court before which issue is so joined may command the sheriff or other minister to whom the making of the return shall belong to return forthwith a competent number of men of the county, division, or other district within the jurisdiction of such Court, qualified according to law to try such issue; and such sheriff or other minister shall, at such command, forthwith make such return accordingly. (*m*)

(*m*) Foster, 41, 46, and 111.

Art. 13.

Special jury.

A special jury may be had upon motion made on behalf of the Queen, or upon

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the motion of any prosecutor or defendant in any criminal case, except indictments for treason or felony, depending in the Court of Queen's Bench, or in any of the Superior Courts of the counties palatine, by means of and subject to such procedure, rules, orders, and provisions as are specified or referred to in the Act passed in the 6th year of the reign of King Geo. IV. in Article 6 of Section 1 of Chapter II. of this Act mentioned.

ART. 14.

Where the prosecutor or accused (as the case may be), having obtained a rule of Court for the striking of a special jury, as in the Act in the last preceding Article referred to is mentioned, shall not proceed to the nomination of such jury, the other party may obtain an office copy of such rule, and proceed upon it if he think fit, or may apply for a rule of Court to have the accused tried by a common jury. (*n*)

(*n*) R. *v.* Edwin Smith, Easter Vac. 1836; Corner's P. 138.

ART. 15.

After the nomination and reduction of the special jurors' list in the manner mentioned or referred to in the Act in Article 13 of this Chapter mentioned, the rule for striking a special jury must be discharged by consent or otherwise before the accused can be tried by a common jury. (*o*)

(*o*) Corner's P. 138.

ART. 16.

Jurors, failure of, when trial at Bar.

Where the accused is to be tried at bar in the Court of Queen's Bench, if a full jury shall not appear before that Court, or if, after appearance of a full jury, by challenge on the part of the Queen or of the accused, or for any other cause, the jury is likely to remain untaken for default of jurors, the trial is to be postponed and a writ of *distringas* issued, tested and returnable before the Queen according to the course and practice of such Court, commanding the sheriff to distrain the bodies of the jurors summoned in pursuance of the writ of *venire facias juratores*, so that he have their bodies before the Queen at a day named in such writ of *distringas*, and to add 11, 10, or such other number of men of his county as may be necessary to make up the deficiency in the number of jurors, qualified according to law, so that the jury may not remain untaken for default of jurors. (*p*)

(*p*) Corner's P., 259; Pac. Ab. "Juries," B. 2. If the next Article be extended to cases where there is a default of jurors upon trials at bar in the Court of Queen's Bench, as we have suggested, this Article may be omitted.

ART. 17.

Jurors, failure of. Talesmen.

Where a full jury shall not appear before the Court of Queen's Bench upon a trial at bar, or before any Court of Nisi Prius, Oyer and Terminer, Gaol Delivery, or Session of the Peace, or where, after appearance of a full jury, by challenge on the part of the Queen or of the accused, or for any other cause, the jury is likely to remain untaken for default of jurors, every such Court, on request made for the Queen by any one thereto authorized or assigned by the Court, shall command the sheriff or other minister to whom the making of the return shall belong, to name and appoint, so often as need shall require, so many of such other able men of the county, division or other district within the jurisdiction of the Court then present as shall make up a full jury; and such sheriff or other minister shall, at such command of the Court, return such men duly qualified as shall be present or can be found to serve on such jury, and shall add and annex their names to the former panel; provided that where a special jury shall have been struck for the trial of any issue, the talesmen shall be such as shall be empannelled upon the common jury panel to serve at the same Court, if a sufficient number of such men can be found; and the Court shall proceed to the trial of any plea or issue with those jurors who were before empannelled, together with the talesmen so newly added and annexed as if all such jurors had been originally returned upon such panel. (*q*)

(*q*) 6 Geo. IV. c. 50, s. 37, in part. The provisions of the enactment from which the above Article is borrowed appear to apply to civil courts and courts of nisi prius only; but it appears to us that it would be attended with advantage if they were extended to the Court of Queen's Bench and the other Courts mentioned in that Article. If our suggestion be adopted, the proceeding by writ of *decem tales* may be abolished, and Article 16 of this Chapter will not be required.

ART. 18.

At Courts of Oyer and Terminer, Gaol Delivery, or Sessions of the Peace, new panel may be returned on failure of jurors.

Where a full jury shall not appear before any Court of Oyer and Terminer, Gaol Delivery, or Session of the Peace, or where, after appearance of a full jury, by challenge on the part of the Queen or of the accused, or for any other cause, the jury is likely to remain untaken for default of jurors, every such Court may command the sheriff or other minister to whom the making of the return shall belong to return forthwith a competent number of men of the county, division, or other district within the jurisdiction of the Court, qualified according to law, so that the jury may not remain untaken for default of jurors; and such sheriff or other minister shall, at such command of the Court, forthwith return a new panel of jurors accordingly, made out as in Articles 9 and 10 respectively of this Chapter is mentioned; and it shall not be necessary that any of those returned in the former panel and sworn should be returned in such new panel. (*r*)

(*r*) The power to order *ore tenus* the immediate return of a new panel of jurors appears to be confined to justices of gaol delivery (Fost. 63, 64; 4 Harg. St. Tr. 744; Hawk. P. C. b. 2, c. 41, s. 1; Chitty's C. L. pp. 506–8); but since we propose to assimilate the mode of summoning juries before Courts of Oyer and Terminer and Sessions of the Peace (see Art. 9) to that which exists in the case of Courts of Gaol Delivery, we recommend that the like power should be extended to Courts of Oyer and Terminer and Sessions of the Peace. As regards Courts of Oyer and Terminer, it is not at all clear that they can, even by writ of *venire*, award a jury returnable within less than 15 days (Bac. Ab. Trial I.) At sessions it appears that the justices in cases of felony may, after plea pleaded, issue a special precept in the nature of a *venire facias juratores*, returnable immediately, and may, if a sufficient number of jurors are returned thereon, proceed to try the party on the same day, or at the same session (1 Hal. 28, 261); though this is doubted by older authorities (see Dalt. c. 185; Staund. P. C. lib. 3, c. 5). Justices at sessions seem also to possess the like power as regards misdemeanors, where the party is in prison, or consents to waive the formality of a special precept. (Hawk. P. C. b. 2, c. 41, s. 4; Chitty's C. L. 513.) We submit that, at all events, it will be attended with advantage that the law on the subject should be settled and made uniform.

ART. 19.

Special jurors, failure of.

If after a special jury has been struck a full jury shall not appear, or if after appearance of a full jury the jury is for any cause likely to remain untaken for default of jurors, no new special jury can be struck, but the accused must be tried by the jury first appointed, or so many of them as shall appear, with the addition of talesmen in manner in Article 17 of this Chapter mentioned. (*s*)

(*s*) 5 T. R. 453; 6 Geo. IV. c. 50, s. 37.

ART. 20.

Where, in any of the events mentioned in the last preceding Article, the party who has obtained a special jury declines to pray a tales in manner in that Article mentioned, the other party may do so; except in cases prosecuted by the Crown.

ART. 21.

Provisions descriptive of the persons who are qualified and liable to serve, of those who are disqualified to serve, and of those who are exempt from serving on common and special juries, and regulations as to the time and mode of summoning and returning persons to serve on such juries, and other matters relating thereto, are contained in the Act passed in the 6th year of the reign of King Geo. IV., the Act passed in the Session of Parliament holden in the 5th and 6th years of the reign of King Will. IV., and the Act passed in the Session of Parliament holden in the 2nd and 3rd years of Her present Majesty's reign, severally mentioned in Article 6 of Section 1 of Chapter II. of this Act, respectively.

ART. 22.

Matter of exemption or disqualification is not available to a person duly summoned to serve on a jury, and reasonably able to attend the Court, unless he attend and show such matter to be true.

ART. 23.

All the rules contained or referred to in this Chapter with respect to juries in Courts of Oyer and Terminer or Gaol Delivery shall, unless it be otherwise provided, apply to juries before any Special Commission of Oyer and Terminer or Gaol Delivery. (*t*)

(*t*) Fost. 64; Cro. Car. 583.

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ART. 24.

View.

A view of the place in question may be had at the instance of either the prosecutor or the accused, in any criminal case depending in the Queen's Bench or in any of the superior Courts of the counties palatine, by means of, and subject to, such procedure, rules, orders, and provisions as are specified or referred to in the Act passed in the 6th year of the reign of King Geo. IV. in Article 6 of Section 1 of Chapter II. of this Act mentioned.

ART. 25.

Jury de medietate linguæ.

Special provisions concerning juries for the trial of aliens charged with any other offence than treason are contained in the Act passed in the 6th year of the reign of King Geo. IV. in Article 6 of Section 1 of Chapter II. of this Act mentioned. (*u*)

(*u*) 6 Geo. IV. c. 50, s. 47. The Act only mentions aliens indicted or impeached of any felony or misdemeanor; and the privilege of being tried by a jury *de medietate linguæ* appears to have been taken away in the case of treason by the 1 and 2 Phil. and Mary, c. 10, which enacts "That all trials for treason shall be according to the course of the common law." Hawk. P. C. b. 2, c. 43, s. 37.

ART. 26.

Attendance of witnesses.

All the rules contained in Articles 34, 35, 36, 37, 38, 39, and 40, of Section 1 of Chapter II. of this Act shall apply to enforcing the attendance of witnesses before juries in the Courts in those Articles respectively mentioned, as well as before grand juries, and shall apply in the case of the witnesses for the accused as well as in that of the witnesses against him. (*x*)

(*x*) See 7 Will. III. c. 3, s. 7, and 1 Ann, c. 9; Hawk. P. C. b. 2, c. 46, ss. 170–172.

ART. 27.

Whensoever, in pursuance of Article 23 of Section 1 of Chapter II. of this Act, any bill of indictment shall be found by such grand jury as therein is mentioned against any person for any offence committed or charged to be committed within the county of any city or town corporate, the Court of Oyer and Terminer or General Gaol Delivery of the next adjoining county before which such bill shall be found may compel the attendance of witnesses upon the trial of any such indictment in like manner as in cases of indictments found in any such Court for any offence committed within any such adjoining county. (*y*)

(*y*) 38 Geo. III. c. 52, s. 4, in part.

ART. 28.

Expenses of witnesses.

A witness, upon being served with any such writ of subpœna as in Article 34 or 35, referred to in Article 26 of this Chapter, is mentioned, is bound to obey such writ, although his expenses shall not have been paid or tendered him, even where the trial is at any sittings or assizes upon a record from the Court of Queen's Bench. (*z*)

(*z*) R. *v.* Cooke, 1 Car. and P. 322.

ART. 29.

Depositions of witnesses residing abroad.

Provision is made for the taking of depositions of witnesses residing abroad by two Acts, the one passed in the 13th year of the reign of King Geo. III., intituled "An Act for the establishing certain Regulations for the better Management of the Affairs of the East India Company, as well in India as in Europe, (*a*) and the other passed in the 1st year of the reign of his late Majesty King William IV., intituled "An Act to enable Courts of Law to order the Examination of Witnesses upon Interrogatories and otherwise." (*b*)

(*a*) 13 Geo. III. c. 63.
(*b*) 1 Will. IV. c. 32.

CHAPTER VII.

TRIAL.

SECTION I.

Time and Place of Trial.

ART. 1.

Place of trial.

UNLESS where otherwise specially provided, a person indicted for any offence may be tried by any Court before which such offence may be inquired of by a grand jury.

ART. 2.

Trial at bar.

Where an indictment is pending, or an information has been filed in the Court of Queen's Bench, the Attorney-General prosecuting for the Crown is at his election entitled to a trial at bar. (*a*)

(*a*) 1 Str. 644.

ART. 3.

In other cases, where an indictment is pending, or an information has been filed in the Court of Queen's Bench, it is discretionary with that Court to grant a trial at bar; it is also discretionary with that Court to appoint a day for such trial when granted.

ART. 4.

Where an indictment is pending in the Court of Queen's Bench for an offence committed in London or in a county palatine, a trial having been awarded, as hereinafter in this Section is mentioned, on suggestion for a trial in an adjoining county, such trial may be had at bar. (*b*)

(*b*) Pearse *v.* Lord Fauconberg, 1 Burr. 292. It has been doubted whether a jury be compellable to attend a trial at bar in the Queen's Bench from London or a county palatine; but by the course stated in the above Article, such a trial may be had, ib. and Corner's P. 259.

ART. 5.

At Nisi Prius.

Where a trial at bar is not granted, the record is sent to be tried at the sittings, or at the assizes held for the county where the offence was committed.

ART. 6.

But before the record can be so sent as in the last preceding Article is mentioned, the warrant of the Attorney-General is necessary for the purpose. (*c*)

(*c*) 2 East, 202-207; 2 Ld. Ray. 1082; 6 Mod. 247; Corner's P. 142.

ART. 7.

In different county.

Where an indictment is pending, or an information has been filed in the Court of Queen's Bench, it is competent to that Court in term time, or to a judge of that Court in vacation, after issue joined, (*d*) upon application made by the prosecutor or defendant, grounded on proper affidavits, to direct a trial to be had in a county different from that in which the offence is alleged to have been committed, there being just reason to apprehend that a fair trial cannot be had in the latter county. (*e*)

(*d*) R. *v.* Forbes, 2 D. P. C. 440.

(*e*) East, 210; 6 T. R. 195; 7 T. R. 735; 1 Bla. R. 378; R. *v.* Luxborough, 1 D. P. C. 527; Corner's Practice, 134.

ART. 8.

To warrant a trial by virtue of the last preceding Article, on the application being granted, a suggestion is to be entered on the roll accordingly, and such suggestion is not traversable. (*f*)

(*f*) 3 Burr. 1333; 1 Black. R. 379; R. *v.* Hunt and others, 3 B. and Ad. 448.

ART. 9.

Such suggestion, as in the last preceding article is mentioned, may be entered by one of several defendants, if it do not appear that the rest dissent. (*g*)

(*g*) R. *v.* Brown, 6. Jur. 168; Harrison's Ind. 7172.

ART. 10.

In county next adjoining to the county of a city or town corporate.

In case of any indictment removed into the Court of Queen's Bench by writ of *certiorari*, or of any information filed in that Court, if the *venue* be laid in the county of any city, or town corporate, within England, it shall be lawful for such Court, at the prayer and instance of any prosecutor or of any defendant, to direct the issue or issues joined in such indictment or information, to be tried by a jury of the county next adjoining to the county of such city or town corporate, and to award the proper jury process accordingly, if such Court shall think it fit and proper so to do. (*h*)

(*h*) 38 Geo. III. c. 52, s. 1, in part.

ART. 11.

If it shall appear to any Court of oyer and terminer or general gaol delivery for the county of any city or town corporate, that any indictment found by any grand jury of the county of such city or town corporate, is fit and proper to be tried by a jury of any next adjoining county, it shall be lawful for such Court, at the prayer of any defendant, to order such indictment, and the several recognizances, examinations, and depositions, relative to such indictment, to be filed with the proper officer, to be by him kept among the records of the Courts of oyer and terminer or general gaol delivery for such next adjoining county, and to commit every defendant in such indictment mentioned, if not in prison, to the gaol of such next adjoining county, and to cause the prosecutors and witnesses against such defendant to enter into a recognizance or recognizances to prosecute and give evidence against such defendant at the sessions of oyer and terminer and general gaol delivery for such next adjoining county; and such proceedings and trial shall be had, and the same judgment shall be given in such last-mentioned Court of oyer and terminer or general gaol delivery as would and might be had and given in cases of indictments for the like offences committed within such adjoining counties. (*i*)

(*i*) 38 Geo. III. c. 52, s. 3, in part.

ART. 12.

The rules contained in Articles 24 and 25 of Section 1 of Chapter II. of this Act shall apply as well to Articles 10 and 11 of this Section as to Article 23 of such first-mentioned Section.

ART. 13.

Nothing in Articles 10 and 11 of this Section contained shall extend to enable any person to remove any indictment or other criminal proceeding, except the person applying for such removal shall enter into a recognizance before the Court or justice of the peace to whom such application shall be made, in the sum of 40*l*., conditioned to pay the extra costs attending the prosecution for such offence, in such next adjoining county, provided the Court before whom the trial is had shall be of opinion that he ought to pay the same. (*k*)

(*k*) 38 Geo. III. c. 52, s. 12.

ART. 14.

Indictment found at quarter sessions may be tried at assizes.

An indictment found at a Court of quarter sessions for an offence inquirable there, may be transmitted to the assizes for trial without a writ of *certiorari*. (*l*)

(*l*) Dick. Quarter Sessions, by Talfourd, 145. By the stat. 4 Edw. III. c. 2, justices, as keepers of the peace, had authority to inquire concerning felonies and trespasses committed within the county, and they were to send them to the justices of gaol delivery, who were to hear and determine them at the next gaol delivery, whether the parties were in gaol or admitted to bail. This course is still legal, although the power of hearing and determining such offences is given to the quarter sessions by the stat. 18 Edw. III. c. 2. See R. *v.* Wetherell, Russ. and Ry. C. C. R. 381; 4 Inst. 168; 4 Haw. P. C. b. 2, c. 5, s. 32; c. 6, s. 2; c. 8, s. 57.

ART. 15.

Court of Nisi Prius has no power to try indictment found by Court which wants jurisdiction.

An indictment found before a Court which wants jurisdiction to take it is void, and a judge at nisi prius has no power to try it after removal by *certiorari*. (*m*)

(*m*) Rex *v.* Haynes, R. and M. 298.

ART. 16.

What offences justices of the peace cannot try.

Neither justices of the peace acting in and for any county, riding, division or liberty, nor the recorder of any borough, shall at any session of the peace or at any

adjournment thereof, try any person for any offence punishable with death, or for any felony which when committed by a person not previously convicted of felony, is punishable with the penalties of the 3rd, 4th, or 5th Class specified in the 24th Chapter of the Act of Crimes and Punishments, (*n*) or for any of the following offences; (that is to say),

1. Misprision of treason.
2. Offences against the Queen's title, *authority*, prerogative, person or government, or against either House of Parliament *or the constitution, inferior to treason.* (*o*)
3. Offences against religion.
4. Administering and taking unlawful oaths.
5. Perjury and subornation of perjury. (*p*)
6. Forgery.
7. Maliciously setting fire to crops of corn, grain or pulse, or to any part of a wood, coppice or plantation of trees, or to any heath, gorse, furze or fern.
8. Bigamy, and offences against the laws relating to marriage.
9. Abduction of women and girls.
10. Endeavouring to conceal the birth of a child.
11. Offences against any provision of the Act of Crimes and Punishments relating to bankrupts and insolvents.
11. Composing, printing or publishing blasphemous, seditious or defamatory libels.
13. Bribery.
14. Unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence which such justices or recorder respectively have, or has jurisdiction to try, when committed by one person.
15. Stealing, or fraudulently taking, or obliterating, injuring or destroying records or documents belonging to any court of law or equity, or relating to any proceeding therein.
16. Stealing, or fraudulently destroying or concealing wills or testamentary papers, or any document or written instrument, being or containing evidence of the title to any real estate, or any interest in lands, tenements or hereditaments. (*q*)
17. Any offence of escaping, breaking prison, or being rescued in manner in any Article of Chapter V. of the Act of Crimes and Punishments mentioned. (*r*)
18. Offences against Article 6 or Article 7 of Section 4 of Chapter XVIII. of the Act of Crimes and Punishments. (*s*)

(*n*) The words of the statute 5 and 6 Vict. c. 38, s. 1 (the provisions of which are embodied in the above Article), are "punishable by transportation beyond the seas for life."

(*o*) The words in italics have been added to remove all doubt as to whether all the offences contained in Section 3 of Chapter II. of the Act of Crimes and Punishments are intended to be included. Some of them are not within this head, as contained in the statute; for instance, the offences in Articles 8, 9, 11, 12, and 13 of the before-mentioned Section, are included under the separate head of "Offences subject to the penalties of præmunire" (a head which we omit, as those penalties are not contained in the Act of Crimes and Punishments). As it is presumed, however, that the offences which formerly subjected to the penalties of præmunire are still to be excepted out of the jurisdiction of Courts of Quarter Sessions, and as some of such offences form part of the Section of the Act of Crimes and Punishments before alluded to, the words in italics have been added to make the description in the statute embrace the description of that Section of the Act of Crimes and Punishments. As to the remainder of such offences, viz., those relating to the obtaining of any stay of proceedings in suits for monopolies, and against persons for making purveyance for the Crown (21 Jac. I. c. 3, s. 4; and 12 Car. II. c. 24, s. 14); and the offence of unlawfully sending British subjects as prisoners beyond the seas, (see Chapter XV. Section 7, Article 35 of the Act of Crimes and Punishments), the former are proposed to be repealed (see p. 49 of our Fourth Report), and the latter is punishable with the penalties of the 4th Class, and so no special reference to it requisite.

(*p*) The statute also contains the head of "making or suborning any other person to make a false oath, affirmation, or declaration, punishable as perjury or as a misdemeanor;" but as those offences are by the Act of Crimes and Punishments comprised within the definition of perjury or subornation of perjury, we have omitted that head.

(*q*) 5 and 6 Vict. c. 38, s. 1, in part.

(*r*) This head is not contained in the 5 and 6 Vict. c. 38; but see 56 Geo. III. c. 63, s. 45; 59 Geo. III. c. 136, s. 20; 4 Geo. IV. c. 64, s. 44; 1 and 2 Vict. c. 82, s. 14; 5 and 6 Vict. c. 29, s. 28.

(*s*) 53 Geo. III. c. 141, ss. 8 and 9. This Act makes the offences above referred to punishable on conviction *in any Court of assize, oyer and terminer, and general gaol delivery.*

ART. 17.

Provided that nothing in the last preceding Article contained shall be construed to give authority to the justices of the peace acting in and for the cities of London and Westminster, the liberty of the Tower of London, the borough of Southwark, and the counties of Middlesex, Essex, Kent, and Surrey, to try any person for any offence committed, or alleged to be committed, within the jurisdiction of the Central Criminal Court, which such justices are restrained from trying, under the provisions of an Act passed in the session of Parliament holden in the 4th and 5th years of the reign of King William IV., intituled "An Act for establishing a new Court for the trial of offences committed in the metropolis and parts adjoining." (*t*)

(*t*) 5 and 6 Vict. c. 38, s. 1, in part.

ART. 18.

Trial of peers.

A peer cannot waive his privilege of being tried by his peers, and consent to be tried by a jury; but for offences under treason, misprision of treason, or felony, a peer is to be tried by a jury. (*x*)

(*x*) 2 Inst. 49, 4 Edw. III. Com. Dig. Parl. 16.

ART. 19.

Time of trial.

In the case of an information ex officio, the Attorney-General may bring the case to trial at what time he thinks proper. (*y*)

(*y*) 1 Chitty's C. L. 847.

ART. 20.

Provided nevertheless that if any prosecution for a misdemeanor, instituted by Her Majesty's Attorney or Solicitor-General in the Court of Queen's Bench, or any session of oyer and terminer, or session of the peace, shall not be brought to trial within 12 calendar months next after the plea of "not guilty," shall have been pleaded therein, it shall be lawful for the Court in which such prosecution shall be depending, on application to be made on the behalf of any defendant in such prosecution, of which application 21 days' previous notice shall have been given to Her Majesty's Attorney or Solicitor-General to make an order, if the Court shall see just cause so to do, authorizing the defendant to bring on the trial in such prosecution, and it shall thereupon be lawful for such defendant to bring on such trial accordingly, unless a *nolle prosequi* shall have been entered in such prosecution. (*z*)

(*z*) 60 Geo. III. and 1 Geo. IV. c. 4, s. 9; 2 East, 509; 1 Chitty's C. L. 487, 488, 310, 847.

ART. 21.

Notice of trial.

In the case of a criminal information upon issue in fact joined, notice of trial is to be given by the prosecutor: if the prosecutor omit to give notice for the next assizes or sittings after issue joined, notice of trial, as by proviso, may be given by the defendant for the next assizes or sittings after default made by the prosecutor. (*a*)

(*a*) Corner's P. 177.

ART. 22.

If no proceedings have been taken on an indictment for a misdemeanor pending in the Court of Queen's Bench for 12 months, or four terms, a clear term's notice must be given of the intention to proceed. (*b*)

(*b*) Corner's P. 132.

ART. 23.

And notice in such case shall be given before the essoign day of the term. (*c*)

(*c*) The general rule, Hil. 2 Wm. IV., does not apply to proceedings on the Crown side; Corner's P. 132.

ART. 24.

If the prosecutor, after such delay, mean to proceed to trial after the end of term, notice of the intention to proceed is to be given before the term, and notice of trial is to be given after the end of the term. (*d*)

(*d*) Corner's P. 132.

ART. 25.

The defendant cannot proceed to trial at nisi prius by proviso, in cases prosecuted by the Crown. (*e*)

(*e*) For no laches is imputable to the Crown, 2 East, 202; Corner's P. 136.

ART. 26.

In cases removed by the prosecutor, the defendant is not entitled to give notice of trial or issue jury process, as by proviso, until the prosecutor has made default by allowing a sitting of nisi prius or an assize to pass over after issue joined without giving notice of trial and proceeding to trial accordingly. (*f*)

(*f*) Corner's P. 136.

ART. 27.

If the prosecutor omit to give notice of trial for the next assizes or sittings after issue joined, notice of trial as by proviso may be given by the defendant for the next ensuing sittings or assizes after default made by the prosecutor. (*g*)

(*g*) Corner's P. 177.

ART. 28.

The record of nisi prius is to be made up by the party who gives the notice of trial from an office copy of the indictment; it is to be engrossed on parchment, and sealed and passed, at the Queen's Bench Office, as other records of nisi prius are. (*h*)

(*h*) Corner's P. 143.

ART. 29.

Notice of trial at nisi prius by a prosecutor.

Where the trial is to be had at any sittings or assizes upon a record from the Court of Queen's Bench, notice of trial is to be given by the prosecutor when he takes down the record, or by the defendant when he takes down the record, as conditioned by his recognizance, and the rule as to the length of notice is the same as in the case of a civil record, that is to say, eight days' notice is necessary for the sittings in London or Middlesex if the defendant reside within 40 miles of London, 14 days' if he reside beyond that distance; but if the notice specify that the cause is to be tried at the adjournment day in London, eight days' notice before the first sitting day, if the defendant reside above 40 miles, and four days' if within that distance will be sufficient; and 10 days' notice of trial before the commission day is sufficient for the assizes. (*i*)

(*i*) Corner's P. 136; and see R. *v.* Featherstonehaugh, 8 C. and P. 109.

ART. 30.

Assizes and sessions.

Where the defendant is under recognizance to try his traverse at the sessions, notice of trial is to be given according to the course of the Court. (*j*)

(*j*) The practice of different Courts is not uniform on this point, consequently no general rule can be laid down. Justices at sessions may fix the time of notice of trial. 4 Bl. Comm. 351; 1 Ch. C. L. 488.

ART. 31.

But the prosecutor, in order to secure a trial at the next sittings or assizes, may give notice of trial. (*k*)

(*k*) Corner's P. 135.

ART. 32.

Renewed notice of trial.

If a cause remain untried for want of special jurors, there must be a renewed notice of trial, and the same jury are to be re-summoned. (*l*)

(*l*) Corner's P. 143.

ART. 33.

Form of notice.

The notice of trial is to specify generally the nature of the offence, and is to be signed by the party or his attorney. (*m*)

(*m*) It has been said that at sessions the notice is to be signed by the defendant himself, and not by the attorney; it seems to be desirable that a general rule should be prescribed.

ART. 34.

Default after notice.

If either party, after notice of trial given, where the record is in the Queen's Bench, omit to enter the cause, or to issue jury process, or to carry in the record, or withdraw his record, without having countermanded notice of trial in due time, he is liable to the costs of the day; and if a defendant, who has removed the indictment, be guilty of such laches, an application may be made for a *procedendo*. (*n*)

(*n*) 8 East, 269; 1 Salk. 193; 1 Stra. 33; 2 Stra. 937–946; Corner's P. 141.

ART. 35.

The Crown pays no costs for not proceeding to trial. (*o*)

(*o*) R. *v.* Edwards, Salk, 193; (Secus) in case of amendment.

ART. 36.

The prosecutor may, to secure trial, at his own cost, give notice of trial, make up the record, and proceed as though the duty of carrying the record to trial were incumbent upon him and not upon the defendant. (*p*)

(*p*) Corner's P. 126.

ART. 37.

Where an indictment has been removed by one or some only of several defendants, and notice of trial is given by that or those defendant or defendants only, notice is to be given by him or them to the other defendant or defendants, as well as to the prosecutor. (*q*)

(*q*) Corner's P. 136, where it is said that in such case the safest course is for the *prosecutor* to give notice to such defendant or defendants.

ART. 38.

Where notice of trial has been given by or to some of several defendants, and others plead too late to give full notice of trial, the latter cannot properly be tried on the same record of nisi prius, unless by consent or order of the court or a judge. (*r*)

(*r*) Corner's P. 136.

ART. 39.

Service of notice.

Notice of trial by the defendant where he is indicted at a session of oyer and terminer, or of the peace, is, when requisite, to be served personally on the prosecutor. (*s*)

(*s*) Chitty's C. L. 488.

ART. 40.

If after such notice given the prosecutor do not appear, the defendant on proof of notice will be entitled to an acquittal. (*t*)

(*t*) 1 Chitty's C. L. 489.

ART. 41.

In case the prosecutor cannot be found on proof by affidavit of the endeavour to serve him, it is competent to the Court to direct what service shall be sufficient, and proceedings shall be had accordingly.

ART. 42.

Although a defendant has been held to bail more than twenty days before any session of the peace, session of oyer and terminer, or session of gaol delivery, to answer an indictment, found at a previous session, he cannot compel the prosecutor to try at the second session under the provisions of Article 50 of this Section, unless he give him notice of trial. (*u*)

(*u*) Rex *v.* Minshall, 8 C. and P. 576.

ART. 43.

Want of notice, when waived.

The want of notice by a defendant of his intention to try his traverse is waived by the appearance of the prosecutor. (*x*)

(*x*) Rex *v.* Hobby, 1 C. and P. 660.

ART. 44.

An insufficient notice of trial on the part of a defendant is not waived by the prosecutor's instructing counsel to state that he has not had sufficient notice of trial, or by putting in an affidavit stating that he has not been able to obtain the attendance of his witnesses. (*y*)

(*y*) Rex *v.* Featherstonehaugh, 8 C. and P. 109.

ART. 45.

Time of trial for treason or felony.

If any person committed for treason or felony [or any of the misdemeanors pecified in Article 18 of Section 5 of Chapter I. of this Act, (*z*)] plainly and specially expressed in the warrant of commitment, shall not, upon his prayer or

petition in open court the first week of the term, or first day of the sessions of oyer and terminer or general gaol delivery, to be brought to his trial, be indicted some time in the next term, session of oyer and terminer, or general gaol delivery, after such commitment, it shall be lawful for the judges of the Court of Queen's Bench, and justices of oyer and terminer or general gaol delivery, upon motion to them made in open court the last day of the term, session, or gaol delivery, either by the prisoner or any one on his behalf, to set at liberty the prisoner, upon bail, unless it appear to the judges and justices upon oath made that the witnesses for the Queen could not be produced the same term, session, or gaol delivery; and if any person so committed shall not, upon his prayer or petition in open court, the first week of the term or first day of the sessions of oyer and terminer and general gaol delivery to be brought to his trial be indicted and tried the second term, session of oyer and terminer or general gaol delivery, after his commitment, or upon his trial shall be acquitted, he shall be discharged from his imprisonment. (*a*)

(*z*) We have inserted the words between brackets, for the same reason that we have inserted the like words in Article 4 of Section 2 of Chapter XI. See the note to that Article.

(*a*) 31 Car. II. c. 2, s. 7. See 1 Vent. 346.

ART. 46.

Provided that nothing in the last preceding Article contained shall extend to authorize the discharge by justices of gaol delivery of persons triable only in the Court of Queen's Bench or under a special commission. (*b*)

(*b*) Rex *v.* Platt, 1 Leach, C. C. L. 157, 170.

ART. 47.

Any person prosecuted for any misdemeanor by indictment at any session of the peace, session of oyer and terminer or session of gaol delivery, who shall be in actual custody, although, as mentioned in Article 6 of Section 2 of Chapter V. of this Act, bound to plead at the same session, is nevertheless, if he shall not have been committed for such offence 20 days before the session at which such indictment is found, intitled at his option to be tried at the same or a subsequent session, and in the latter case is to be detained in custody until such subsequent session, unless he enter into a recognizance with two sureties to appear, enter and try his traverse at such subsequent session, and not depart the Court without leave on that occasion, whereupon he may be discharged.

ART. 48.

Indictments for misdemeanor at Central Criminal Court, &c., not to be traversed without cause shown.

Provided that no person against whom any bill of indictment shall be found for misdemeanor at the Central Criminal Court, or at any sessions of the peace for the county of Middlesex, shall be entitled to traverse the same to any subsequent sitting of the Court; but the Court shall forthwith proceed to try the same, unless upon good cause to be shown by the person against whom the same is found or the prosecutor, and to be allowed by the Court, for the postponement of the trial (*c*)

(*c*) 7 and 8 Vict. c. 71, s. 6.

ART. 49.

Any person prosecuted for any misdemeanor by indictment at any session of the peace, session of oyer and terminer, or session of gaol delivery, having been committed to custody or held to bail to answer for such offence, 20 days at the least before the session at which such indictment is found, shall plead (*d*) to such indictment, and trial shall proceed thereon at such session, unless a writ of *certiorari* to remove such indictment be delivered at such session before the jury shall be sworn for such trial. (*e*)

(*d*) We have introduced the provisions of this and Article 50 in this place, because we conceive that they affect the time of *trial* and not the time of *pleading*. A party indicted, whether in custody or under recognizance to answer, would be bound to plead to the indictment independently of these provisions, but, having pleaded, they compel him to try at the same session.

(*e*) 60 Geo. III. and 1 Geo. IV. c. 4, s. 3.

ART. 50.

Where any person shall be prosecuted for any misdemeanor by indictment at any session of the peace, session of oyer and terminer, or session of gaol delivery, not having been committed to custody or held to bail to appear to answer for such

offence 20 days before the session at which such indictment shall be found, but who shall have been committed to custody or held to bail to appear to answer for such offence at some subsequent session (*f*) or shall have received notice of such indictment having been found, 20 days before such subsequent session, he shall plead to such indictment at such subsequent session, and trial shall proceed thereupon at such same session unless a writ of *certiorari* for removing such indictment into the Court of Queen's Bench shall be delivered at such last-mentioned session before the jury shall be sworn for such trial.

(*f*) 60 Geo. III. and 1 Geo. IV. c. 4, s. 5. This clause is obscurely expressed; but it seems to have been intended that in case the accused should not have been committed to custody or held to bail 20 days at least before the session at which the indictment was found, but should have been so committed or held to bail within the space of 20 days before that session, or should have been committed or held to bail for such offence before the subsequent session, he should plead, and the trial should proceed at that session, provided he had been held to bail 20 days before such subsequent session, or not having been held to bail 20 days before such subsequent session, should have received notice of such indictment 20 days before such subsequent session. This meaning would be expressed by adding after the words "subsequent session," the words "and shall have been so committed or held to bail 20 days before such subsequent session."

ART. 51.

Provided that nothing in the last two preceding Articles contained shall extend to any prosecution for the non-repair of any bridge or highway. (*g*)

(*g*) 60 Geo. III. and 1 Geo. IV. c. 4, s. 10.

ART. 52.

Provided also that nothing in Articles 49 and 50 contained shall prevent any indictment found by a grand jury of any city or town corporate from being removed at the prayer of any defendant for trial by a jury of the county next adjoining to the county of such city or town corporate, pursuant to the provisions hereinbefore in Article 11 of this Section contained. (*h*)

(*h*) 60 Geo. III. and 1 Geo. IV. c. 4, s. 6, *i. e.*, the provisions of the statute 38 Geo. III. c. 52.

ART. 53.

Provided also that it shall be lawful for the Court at any session of the peace, session of oyer and terminer, or session of gaol delivery, upon sufficient cause shown for that purpose, to allow further time for pleading to any such indictment, or for the trial of the same. (*i*)

(*i*) 60 Geo. III. and 1 Geo. IV. c. 4, s. 6.

ART. 54.

A person who has neither been in custody nor held to bail before the assizes or sessions at which an indictment for a misdemeanor is found against him cannot compel the prosecutor to proceed to trial at that assizes or sessions. (*k*)

(*k*) Reg. *v.* Trenfield, 9 C. and P. 284.

ART. 55.

Where two persons are in custody for a misdemeanor, and one chooses to take his trial at the assizes or sessions at which the indictment is found, and the other to defer the trial to the next assizes or sessions, the trial is to be put off to that time. (*l*)

(*l*) 1 Chitty's C. L. 484; Cro. C. C. 9.

ART. 56.

After such traverse and recognizance entered into as are mentioned in Article 47 of this Section, the recognizance is not satisfied by the defendant rendering himself to prison in discharge of his bail in order to procure himself to be tried at the next assizes under the commission of gaol delivery. (*m*)

(*m*) R. *v.* Fry, 1 Leach, 111; 1 Chitty's C. L. 486.

ART. 57.

But a party under recognizance to try his traverse may, on giving notice of his intention, withdraw his plea, and plead guilty, without entering his traverse. (*n*)

(*n*) By the Judges, in Fry's case. 1 Leach, C. C. L. 129, 3rd edit.

ART. 58.

A defendant bound by recognizance to answer for an offence at the next assizes or sessions, or to an indictment found at a previous assizes or sessions, may, on giving due notice to the prosecutor, compel him to proceed to trial at the next assizes or sessions. (*o*)

(*o*) R. *v.* Fry, 1 Leach, 111; R. *v.* Minshall, 8 C. and P. 576; R. *v.* Trenfield, 9 C. and P. 284.

ART. 59.

If an indictment be found against a defendant at one assizes, and he give notice that he will plead and try at the next assizes, the prosecutor is not bound to try till the third assizes. (*p*)

(*p*) 1 Chitty's C. L. 485; because it is not certain that the defendant will try at those Assizes.

ART. 60.

Presence of defendant.

The Court will not, in capital cases, appoint a time for trial, unless the defendant be brought to the bar, and be personally in Court when a rule is made for the purpose (*q*)

(*q*) Str. 826.

ART. 61.

Record brought down by both prosecutor and defendant.

Where the prosecutor and defendant in an indictment for misdemeanor have each brought down a record, the trial is to be according to priority in the marshal's list. (*r*)

(*r*) Rex *v.* Halse, R. and M. 20.

ART. 62.

Cross indictments.

Where there are cross indictments for assaults, the jury may be sworn in both at the same time. (*s*)

(*s*) Rex *v.* Wanklyn, 8 C. and P. 290.

SECTION 2.

Of Postponement of the Trial and Stay of Proceedings.

ART. 1.

Postponement of trial.

THE Court before which an accused person is to be tried may, on the application of either the prosecutor or the accused, order the trial to be postponed by reason of the illness or absence of a material witness (*a*); or on the ground that a witness, being a child of tender years, is incompetent without instruction to take an oath (*b*); or that circumstances have occurred likely to prevent a fair trial from being had (*c*); for the purpose of procuring evidence which, without default on the part of the prosecution, is not then attainable (*d*); or where the evidence is defective by reason of any improper practice on the part of the party charged, or of others on his behalf (*e*); and in other cases, where the Court is, under the particular circumstances, satisfied that such delay is proper and essential to the ends of justice. (*f*)

(*a*) R. *v.* Savage, 1 C. and K. 75; R. *v.* Hunter, 3 C. and P. 591.
(*b*) R. *v.* White, 1 Leach, C. C. 430.
(*c*) R. *v.* Bolam, 2 M. and Rob. 192.
(*d*) R. *v.* Macarthy, Car. and Marsh. 625.
(*e*) R. *v.* Trenfield, 9 C. and P. 284.
(*f*) R. *v.* Owen, 9 C. and P. 83.

ART. 2.

An indictment for felony having been found against a prisoner committed for a misdemeanor more than 20 days before the assizes, the Court will not postpone the trial on the plea that the prisoner is not prepared to meet the former charge, if the charges be so similar that the prisoner has already been substantially apprized of the charge contained in the indictment. (*g*)

(*g*) R. *v.* Howell, 9 C. and P. 437.

ART. 3.

A trial will not be put off upon a collateral issue unless the defendant will deny the charge by affidavit. (*h*)

(*h*) R. *v.* Ratcliffe, 1 W. Black. 3.

Chap. VII. Sec. 2.

ART. 4.

Where a trial for felony is postponed at the instance of the prosecutor, it is discretionary with the Court to order the accused to be detained to the next assizes or session, or to admit him to bail, or discharge him on his own recognizance. (*i*)

(*i*) Beardmore's Case, 7 C. and P. 407; Parish's Case, *ib.* 782; R. *v.* Osborn, *ib.* 799; see also Crowe's Case, 4 C. and P. 251.

ART. 5.

A motion to put off a trial for felony made on behalf of the accused cannot be entertained until after plea pleaded. (*k*)

(*k*) R. *v.* Bolam, 2 M. and Rob. 192.

ART. 6.

Nolle prosequi.

The Attorney-General has authority in the case of a prosecution for a misdemeanor, to direct a *nolle prosequi* to be entered at any time before judgment. (*l*)

(*l*) See 1 Chitty's C. L. 478—9.

ART. 7.

A *nolle prosequi* cannot be entered by the clerk of the Crown at the instance of the prosecutor without the consent of the Attorney-General. (*m*)

(*m*) 1 Ld. Raym. 721.

ART. 8.

The entering of a *nolle prosequi* does not operate as an acquittal to exclude a further prosecution in respect of the same offence. (*n*)

(*n*) 1 Salk, 59; 6 Mod. 261; 1 Chitty's C. L. 480; Com. Dig. "Indictment K."

ART. 9.

Stay of proceedings.

The Court will not interfere to stay the proceedings on an indictment for a public nuisance, on the ground that the private prosecutor who instituted the proceedings abandoned the prosecution which was then continued by another. (*o*)

(*o*) R. *v.* Wood; 3 B. and Ad. 657.

ART. 10.

Discharge of recognizances.

It is discretionary in the Court to discharge the recognizances of parties bound to prosecute without their preferring any indictment, on the ground of defect in respect of the evidence, or other sufficient cause. (*p*)

(*p*) The Court would not discharge the recognizance on the mere ground of the opinion of the prosecutors (members of a society for promoting religious knowledge among the poor), that the reformation of the offender would be most likely to be promoted by such a course. R. *v.* Paul, 6 C. and P. 323. But in R. *v.* Adams, 6 C. and P. 342, the Court ordered the recognizances entered into by parish officers to prosecute a pauper to be discharged, the parish being unwilling to indict.

ART. 11.

Stay of proceedings on account of publication of parliamentary proceedings.

Provision is made for staying criminal proceedings for, or on account, or in respect of the publication of Parliamentary Reports, Papers, Votes, or Proceedings, under the authority of either House of Parliament, by an Act passed in the Session of Parliament holden in the 3rd and 4th years of the reign of Her present Majesty, intituled "An Act to give summary Protection to persons employed in the Publication of Parliamentary Papers." (*q*)

(*q*) 3 and 4 Vic. c. 9.

Chap. VII. Sec. 3.

SECTION 3.

Of the Presence of the Accused.

ART. 1.

No trial for treason or felony can be had except in the presence of the accused.

ART. 2.

A trial may be had in the Court of Queen's Bench on a charge of misdemeanor, although the accused be not present.

ART. 3.

So also a trial may be had at a session of oyer and terminer, gaol delivery, or of the peace, on a charge of misdemeanor, although the accused be not present, if he have previously appeared and pleaded. (*a*)

(*a*) 1 Ch. C. L. 411, 532, first edition; Talf. Dickinson's Quarter Sessions, 600.

ART. 4. Chap. VII. Sec. 3.

A prisoner in custody upon a charge of misdemeanor, in respect of which he is to be tried, ought to be brought up by order of the Court if in the custody of the Court, and, if in any other custody, by a writ of *habeas corpus*, to take his trial. (*b*)

(*b*) Corner's P. 148.

ART. 5.

A prisoner in custody, but whose personal appearance at the trial is not absolutely necessary, may nevertheless, upon affidavit, procure himself to be brought into Court, upon the trial, by virtue of a writ of *habeas corpus*. (*c*)

(*c*) Corner's P. 148.

ART. 6.

So such a prisoner, as in the last preceding Article is mentioned, if his personal appearance at the trial be required by the prosecutor, may, at the instance of such prosecutor, be brought into Court at the trial, by virtue of a writ of *habeas corpus* granted by a judge on a sufficient affidavit made. (*d*)

(*d*) Corner's P. 148, citing R. *v.* Blake, Mich. Vac. 1843; R. *v.* King, Hil. Vac. 1844.

ART. 7.

A person who surrenders to take his trial for treason or felony is to stand at the bar of the Court. (*e*)

(*e*) Rex *v.* St. George, 9 C. and P. 483.

ART. 8.

The rule does not extend to a case of misdemeanor. (*f*)

(*f*) Rex *v.* Lovett, 9 C. and P. 462.

ART. 9.

The consent of counsel that the trial of a prisoner for misdemeanor may proceed during the time that he is absent from the Court by reason of illness does not authorize the Court to proceed. (*g*)

(*g*) Rex *v.* Streek, 2 C. and P. 413.

SECTION 4. Chap. VII. Sec. 4.

Swearing the Jury.

THE time of trial being arrived, the proper officer of the Court shall call the jury to be sworn; and upon the appearance in Court of a full jury, shall, subject to the right of challenge hereinafter in the next succeeding Section mentioned, swear such jury in manner following, that is to say, shall, in cases of treason or felony, administer to each juror separately the following oath, viz.:—

"You shall well and truly try and true deliverance make between our Sovereign "Lady the Queen and the prisoners at the bar, whom you shall have in charge, "and a true verdict give according to the evidence. So help you God."

And in cases of misdemeanor, either to each juror separately or to any number not exceeding four at a time, the following oath, viz.:—

"You shall well and truly try the issue joined between Our Sovereign Lady "the Queen and the defendant, and a true verdict give according to the evidence. "So help you God." (*a*)

(*a*) As to assimilating the proceedings upon prosecutions for felonies and misdemeanors, see the note to Article 9 of Chap. IV.

SECTION 5. Chap. VII. Sec. 5.

Challenge.

ART. 1.

UPON the appearance in Court of a full jury, (*a*) both the prosecutor and the accused are entitled to challenge such jury, or any of them. Challenge.

(*a*) 4 B. and Ald. 471; 1 Chitty's C. L. 554–5. If a full jury should not appear, the issue would remain untried, *pro defectu juratorum*. But the party who intends to challenge the array may pray *a tales* to complete the number, and then object to the panel. Haw. P. C. b. 2, c. 43, s. 1; Bull. N. p. 307; Hob. 235; Bac. Ab. "Juries," E. 11.

Chap. VII. Sec. 5.

ART. 2.

Kinds of challenge. Such challenge, as in the last preceding Article is mentioned, may be either to the array or to the polls.

ART. 3.

Challenge to the array. A challenge to the array is an exception to the whole panel of jurors returned, and must be made before the swearing of any of the jury is commenced. (*b*)

(*b*) It is laid down in R. *v.* Frost, 9 C. and P. 136, that the swearing is begun so soon as the juror has taken the book into his hand, having been directed by the proper officer to do so.

ART. 4.

Challenge to the polls. A challenge to the polls is an exception to some one or more individual juror or jurors, and must be made in each case before the swearing of the particular juror is commenced. (*c*)

(*c*) See Frost's case, 9 Car. and Payne, 136.

ART. 5.

Provided that, notwithstanding anything in the last two preceding Articles contained, a challenge may be made after such swearing as therein respectively is mentioned, where the cause of challenge arises afterwards or where the Attorney-General consents. (*d*)

(*d*) Co. Litt. 158 *a*; Haw. P. C. b. 2, c. 43, s. 1; 2 Hale, 274; Bac. Ab. Juries, 11; 1 Chitty's C. L. 545.

ART. 6.

Either the prosecutor or the accused may make a challenge to the polls after challenging the array, but neither can challenge the array after challenging the polls. (*e*)

(*e*) Co. Litt. 158 *a*; Bac. Ab. Juries, E. 11; 1 Chitty's C. L. 545.

ART. 7.

Time of making. On a charge of treason or felony, the accused is to be informed, before the swearing of the jury, that if he will challenge them, or any of them, he must challenge them as they come to the book to be sworn, and before they are sworn. (*f*)

(*f*) 1 Chitty's C. L. 532.

ART. 8.

To enable the accused to make his challenges, he is entitled to have the whole panel read over, in order that he may see who they are that appear. (*g*)

(*g*) Fost. 7; Haw. P. C. b. 2, c. 43, s. 4; 6 St. Tr. 245.

ART. 9.

On a prosecution for treason, the jurors are to be called in the order of the panel delivered to the accused. (*h*)

(*h*) 4 Harg. St. Tr. 450.

ART. 10.

Challenge to the array. A challenge to the array must be made in writing; a challenge to the polls may be made orally. (*i*)

(*i*) 1 Chitty's C. L. 546; Tri. per pais. 172.

ART. 11.

On a challenge to the array or to the polls for cause, the opposite party may either confess the facts alleged, deny them by his plea or demur to their sufficiency in law. (*k*)

(*k*) See 1 Chitty's C. L. 548.

ART. 12.

Challenges to the array. Challenges to the array are either principal challenges or challenges for favour.

ART. 13.

A principal challenge to the array is founded on some manifest partiality existing on the part of the returning officer. (*l*)

(*l*) 1 Chitty's C. L. 536; Co. Litt. 156 *a*; 2 Hale P. C. 271; Bac. Ab. Juries, E. 1.

ART. 14.

Grounds of principal challenge to the array.

It is a good ground of principal challenge within the meaning of the last preceding Article if the officer who makes the return be the prosecutor or a party aggrieved; (*m*) or be related to the prosecutor or accused within the ninth degree, although it be but by marriage, at the time of the return; (*n*) or has acted as godfather to any child of the prosecutor or accused, or to whose child the prosecutor or accused has acted as godfather; (*o*) or if any action or suit which implies malice be depending between any such officer and the prosecutor or accused, (*p*) or if the prosecutor or accused have an action of debt against any such officer; (*q*) or if such officer be counsel or attorney to the prosecutor or accused, or be arbitrator for either of them in the case of the same injury for which the accused is indicted; (*r*) or has any legal interest in the event of the prosecution; (*s*) or return any juror at the request of the prosecutor or accused, (*t*) or any juror whom he has reasonable cause for believing to be likely to favour either the prosecutor or the accused; (*u*) or be otherwise so circumstanced that the Court may reasonably suspect his partiality.

(*m*) 1 Leach, 101.
(*n*) Co. Litt. 156 *a*; 1 Leon. 88.
(*o*) Co. Litt. 156; Bac. Abrid. tit. "Juries," E. I.
(*p*) Bac. Abrid. tit. "Juries" E. I.
(*q*) Co. Litt. 156 *a*.
(*r*) Ib.
(*s*) See Co. Litt. 156 *a*; Bac. Abrid. tit. "Juries," E. 1.
(*t*) Ib.
(*u*) Ib.

ART. 15.

So it is also a good ground of principal challenge to the array if the sheriff return as from himself an array which has been returned by the bailiff of a franchise. (*x*)

(*x*) Co. Litt. 156 *a*; Bac. Ab. tit. "Juries" E.; 1 Chitty's C. L. 537.

ART. 16.

But if the sheriff return the array from a liberty, it will be good. (*y*)

(*y*) But the Lord will be entitled to maintain an action against the sheriff. Ib.

ART. 17.

So also, upon the trial of an alien, the want of a jury returned according to the provisions concerning juries for the trial of aliens referred to in Article 25. of Chap. VI. of this Act, is a good ground of principal challenge to the array.

ART. 18.

No challenge shall be taken to any panel for want of a knight being returned, nor any array quashed by reason of such challenge. (*z*)

(*z*) 6 Geo. IV. c. 50, s. 28.

ART. 19.

Nor for default of hundredors. (*a*)

(*a*) This right of challenge has, it has been said, rather fallen into disuse than been rescinded. Co. Litt. 125 *a*; and b. n. 1; 6 Co. 14 *b*; 2 T. R. 240; 2 Hale's, P. C. 163.

ART. 20.

On plea pleaded to a principal challenge to the array, the ground of challenge is to be strictly proved (*b*) to the satisfaction of the Court, and it is in the discretion of the Court to direct the mode in which it shall be tried. (*c*)

(*b*) R. *v.* Savage, Ry. and Moo. C. C. 51.
(*c*) 2 Hale, 275; 1 Chitty's C. L. 547; 4 Black Com. 353; 2 Rol. R. 363; Co. Litt. 57 *a*; Bac. Ab. Juries, E. 12; Chitty's Burn's Just. 38th ed. vol. 3. p. 517.

ART. 21.

Grounds of challenge to the array for favour.

A challenge to the array for favour is founded on the allegation of facts not sufficient in themselves to warrant the Court in inferring partiality, but sufficient as a ground for proceeding to inquire as to the actual existence of partiality in the returning officer. (*d*)

(*d*) Co. Litt. 156 *a*; Bac. Ab. Juries, E. 1. It has been held to be a cause of challenge to the favour if one of the parties be tenant to the sheriff, or if the sheriff have an action of debt against him, or if relationship exist between the children of the party and the sheriff. See 1 Chitty's C. L. 538. As these, however, are but circumstances, and triors are to decide, whether, in fact, partiality exist, it would be useless to detail the particular grounds of such challenges. It has been said that

no challenge for favour can be allowed against the Queen, as the duty of allegiance to her might be supposed to be sufficient to induce a preference, which must defeat every panel: this is not true, however, in capital cases, 2 Hale, P. C. 271; Co. Litt. 156 *a*. n. 4; and is too subtle a rule to be applicable in other cases.

ART. 22.

On plea pleaded to a challenge to the array for favour, triors consisting of any two persons whom the Court in its discretion shall assign, (*e*) are to be sworn and charged to inquire whether it be an impartial array or a favourable one. (*f*)

(*e*) 2 Hale, 275; 2 Rol. Rep. 363; 1 Chitty's C. L. 547, 548.
(*f*) 4 Black Comm. 753; Bac. Ab. Juries, E. 12.

ART. 23.

The ground of a challenge to the array for favour is to be strictly proved by the party making it. (*g*)

(*g*) R. *v.* Savage, Ry. and Moody's C. C. 51.

ART. 24.

If a challenge to the array be affirmed and the array be quashed, a new writ of *venire facias juratores* is to be awarded to such person or persons as the original writ of *venire* might have been awarded to under the provisions of Chap. VI. of this Act, in case the officer who returned such last-mentioned writ had been suspected of partiality before it was directed to him. (*h*)

(*h*) Co. Litt. 158, 8; 1 Chitty's C. L. 548.

ART. 25.

Challenge to the polls.

A challenge to the polls is either peremptory or for cause.

ART. 26.

Peremptory challenges.

A peremptory challenge is such as a person arraigned for treason or felony is allowed to make to a juror without assigning any cause.

ART. 27.

Challenge peremptory.

No person arraigned for treason shall be admitted to any peremptory challenge above the number of 35; (*i*) and no person arraigned for felony shall be admitted to any such challenge above the number of 20. (*k*)

(*i*) In misprision of treason the number seems to have been unsettled. 3 Inst. 27, *a*; Haw. P. C. b. 2. c. 43, s. 5.
(*k*) 6 Geo. IV. c. 50, s. 29, in part.

ART. 28.

Peremptory challenges are permitted on the plea of "not guilty" only, and not upon any collateral issue. (*l*)

(*l*) 2 Hale, P. C. 267; Fost. 42; Bac. Ab. Juries, E. 9.

ART. 29.

If any person indicted for treason or felony (*m*) shall challenge peremptorily a greater number of the men returned to be of the jury than such person is entitled to challenge under the provisions of Article 27 of this Section, every peremptory challenge, beyond the number allowed by that Article, shall be entirely void, and the trial of such person shall proceed as if no such challenge had been made. (*n*)

(*m*) 7 and 8 Geo. IV. c. 28, s. 3.
(*n*) The words of the Act are, "treason, felony, or piracy;" but as defined by the Commissioners (see 4th Rep.), felony includes piracy.

ART. 30.

Where several persons are tried by the same jury, each of such persons has a right to his full number of peremptory challenges. (*o*)

(*o*) Fost. 106–7; 2 Hale's, P. C. 268; Bac. Ab. Juries, E. 10; 3 Salk. 81; 1 Chitty's C. L. 335.

ART. 31.

Where several persons are jointly indicted, they may, if they think fit, join in their challenges, in which case they can only challenge amongst them peremptorily the number allowed by Article 27 of this Section. (*p*)

(*p*) R. *v.* Charwick, 3 Salk. 81.

ART. 32.

Where several persons are jointly indicted, they may be tried separately in order to avoid the inconvenience which might otherwise result from exhausting the jury panel. (*q*)

(*q*) Plow. 100; 2 Hale's P. C. 264; Kel. 9; Hawk. P. C. b. 2, c. 41, s. 9.

ART. 33.

Challenge to the polls for cause.

A challenge to the polls for cause is either a principal challenge or a challenge for favour.

ART. 34.

After a person arraigned for treason or felony has made his peremptory challenges, he is entitled to challenge the polls for cause.

ART. 35.

If the prosecutor or the accused have several causes of challenge against a juror, he must take them all at the same time. (*r*)

(*r*) Co. Litt. 158 *a*; Bac. Abr. tit. "Juries," E. 11.

ART. 36.

In all inquests wherein the Queen is a party, notwithstanding it be alleged by them that prosecute for the Queen, that the jurors of those inquests, or some of them, be not indifferent for the Queen, yet such inquests shall not remain untaken for that cause; but if they that prosecute for the Queen will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the Court; and it shall be proceeded to the taking of the same inquisitions, as it shall be found if the challenges be true or not, after the discretion of the Court. (*s*)

(*s*) 6 Geo. IV. c. 50, s. 29, in part. The 29th Section of the 6 Geo. IV. c. 50, retains the phraseology of the ancient statute 31 Edw. I. st. 4, and the above Article does the same, except that the word *prosecute* is used instead of *sue*, as the Article is applicable to criminal prosecutions only.

ART. 37.

The Queen is not bound to show cause until the whole panel has been exhausted, (*t*) and if the accused challenge the residue of the panel, he must first show all his causes of objection before those that prosecute for the Queen can be called upon to show their ground of challenge. (*u*)

(*t*) 1 Chitty's C. L. 534, 547. The statute 6 Geo. IV. c. 50, s. 29, as to challenges by the Crown does not alter the law as it stood before the statute, R. *v.* Frost, 9 C. and P. 136.

(*u*) Haw. P. C. b. 2, c. 43, s. 3.

ART. 38.

The accused in the case mentioned in the last preceding Article is immediately to show the grounds upon which his objection is founded, and the validity of the objection is to be immediately argued and determined. (*x*)

(*x*) 4 Harg. St. Tr. 738; 1 Chitty's C. L. 547.

ART. 39.

Grounds of principal challenge to the polls.

It is a good ground of principal challenge to the polls, if any person returned to serve as a juror upon the trial of a commoner be a peer, (*y*) or if any man be returned as a juror for the trial of any issue on any criminal charge who is not qualified according to the provisions of the Acts referred to in Article 21 of Chapter VI. of this Act respectively, or is personally incompetent by reason of insanity or otherwise, (*z*) or who has acted as a grand juror in finding the indictment upon which the accused is then arraigned, or any other indictment against him for the same offence, or where any matter came in question which is material to the charge against the accused, (*a*) or who has otherwise, by act or word, manifested such partiality as in the judgment of the Court ought to disqualify him.

(*y*) Co. Litt. 156 *b.*; Bac. Ab. tit. "Juries," E. 6; 6 Geo. IV. c. 50, s. 2.

(*z*) 6 Geo. IV. c. 50. ss. 3 and 27.

(*a*) 25 Edw. III. st. 5, c. 3; Hawk. P. C. b. 2, c. 43, s. 27.

ART. 40.

All grounds of challenge which, when existing on the part of the returning officer, are good grounds of principal challenge to the array, are, so far as the same are applicable, good grounds of principal challenge to the polls, when existing on the part of an individual juror.

ART. 41.

If any man returned as a juror for the trial of any issue on any criminal charge shall be qualified in other respects, the want of freehold shall not be accepted as good ground of challenge, either by the prosecutor or the accused, nor as cause for discharging the man so returned upon his own application. (*b*)

(*b*) See 6 Geo. IV. c. 50, s. 27.

ART. 42.

Provided that nothing in Article 39 of this Section whereby the want of qualification, according to the provisions of the Acts therein referred to, is declared to be a good ground of principal challenge to the polls, and nothing in the last preceding Article contained, shall extend to any special juror. (*c*)

(*c*) See 6 Geo. IV. c. 50, s. 27.

ART. 43.

Where a peer is returned to serve as a juror on the trial of a commoner, he may challenge himself or sue out his writ of privilege. (*d*)

(*d*) Co. Litt. 156 *b*; Com. Dig. challenge, C. 2; Haw. P. C. b. 2, c. 43, s. 11; Bac. Ab. Juries, E. 6; 6 Geo. IV. c. 50, s. 2.

ART. 44.

A juror may challenge himself by stating that he is not qualified; and he may himself be examined on oath. (*e*)

(*e*) 4 Harg. St. Tr. 740.

ART. 45.

On plea pleaded to a principal challenge to the polls, the ground of challenge is to be strictly proved to the satisfaction of the Court, either by the production of the record (where that is the proper proof) or other legal evidence. (*f*)

(*f*) Bac. Ab. Juries, E. 5; Co. Litt. 157 b.; 3 Black. Comm. 363.

ART. 46.

Challenge to the polls for favour.

A challenge to the polls for favour is founded on the allegation of facts not sufficient in themselves to warrant the Court in inferring undue influence or prejudice, but sufficient to raise suspicion thereof, and to warrant inquiry whether such influence or prejudice in fact exists. (*g*)

(*g*) Co. Litt. 157; Bac. Ab. Juries, E. 5, as where the party and proposed juror are fellow-servants, or the latter has been entertained as the guest of the former. Such circumstances are but evidence on which the triors are to exercise their judgment; it would, therefore, be useless to multiply instances in illustration.

ART. 47.

All grounds of challenge which, when existing on the part of the returning officer are good grounds of challenge to the array for favour, are, so far as the same are applicable, good grounds of challenge to the polls for favour when existing on the part of an individual juror. (*h*)

(*h*) 1 Chitty's C. L. 544.

ART. 48.

Challenge to polls how tried.

On plea pleaded, a challenge to the polls for favour is to be decided in manner following, that is to say, triors are to be appointed in manner in the next three succeeding Articles mentioned, and to be sworn to try whether the juror challenged be indifferent between the parties to the issue, (*i*) evidence on oath (*k*) is to be adduced upon the question, and, according to the verdict of the triors, the juror is to be admitted or rejected.

(*i*) 1 Salk. 152; Tri. per pais, 205.
(*k*) Co. Litt. 158 a; Bac. Abrid. tit. "Juries," E. 12.

ART. 49.

In case the challenge be of the first juror called to be sworn, the triors are to consist of two persons, neither being returned of the jury, one to be appointed by the prosecutor and the other by the accused. (*l*) If such juror be admitted, he with the two triors are to try the next challenge if any be made; but after the admission and swearing of a second juror, every subsequent challenge is to be tried by the two jurors so admitted and sworn. (*m*)

(*l*) Co. Litt. 158 a; Bac. Ab. Juries, E. 12.
(*m*) 2 Hale's P. C. 275.

ART. 50.

In case the first challenge be after one juror only has been sworn, the triors are to consist of the juror so sworn, and of two such persons as in the last preceding Article are mentioned, to be added to such juror, one of them by the prosecutor and the other by the accused; but after the admission and swearing of a second juror, every subsequent challenge is to be tried by the two jurors so admitted and sworn. (*n*)

(*n*) 1 Chitty's C. L. 549. It seems to be unnecessary to make a distinction between this case and the case mentioned in Article 49 as to the appointment of the triors. According to the present law, if the plaintiff challenge ten and the plaintiff one, and the twelfth is sworn, the triors to be added are to consist of one *challenged* by the plaintiff and one by the defendant.

ART. 51.

In case several jurors be sworn before any juror be challenged, the Court may assign any two of those sworn to try the challenges of the remainder. (*o*)

(*o*) 2 Hale's P. C. 275; Bac. Ab. Juries, E. 12; 4 Black. Com. 358, n. 8. The authorities contain other rules applicable to particular cases; there seems, however, to be no good reason for any rules, provision having been made for the swearing of two jurors, they are competent by the rule already laid down to try subsequent challenges.

ART. 52.

No challenge of triors is admissible. (*p*)

(*p*) Tr. per pais, 200; 1 Chitty's C. L. 549.

ART. 53.

Where a juror is challenged, he may be examined on the *voire dire* as to the state of his mind or affections in relation to the parties, or as to his qualification to serve as a juror; but he is not to be asked questions tending to his disgrace, discredit, or the injury of his character; or as to his having declared his opinion that the accused was guilty and would be convicted. (*q*)

(*q*) 4 Hargr. St. Tr. 748; Tr. per pais, 205; 1 Salk. 153; Co. Litt. 158 b.; 3 Black. Com. 364; Bac. Ab. Juries, E. 12.

ART. 54.

If a person actually summoned to serve on a jury, on the name of another person being called for the purpose of his being sworn, answer to such name, it is a ground of challenge against the person so answering. (*r*)

(*r*) 12 East, 231, n. *a*.

ART. 55.

On a demurrer to a challenge either to the array or to the polls, it is to be entered of record (*s*) and to be decided either immediately or after consideration at the discretion of the Court. (*t*)

(*s*) Bac. Ab. Juries, E. 12; 3 Leon. 222.
(*t*) Tr. per pais, 199; Style, 464.

ART. 56.

In case, on a demurrer to a challenge, the Court overrule such challenge, the judgment of the Court is entered on the original record, or, at Nisi Prius, on the postea. (*u*)

(*u*) 1 Chitty's C. L. 548.

ART. 57.

In case the Court overrule a challenge without demurrer on its being debated merely, the ruling may be made the subject of a bill of exceptions. (*x*)

(*x*) Bac. Ab. Juries, E. 12; Skin. 101; Hat. 24.

ART. 58.

The challenge may be removed as parcel of the record where it was a principal cause of challenge. (*y*)

(*y*) 3 Woodeson, sec. 347; Joy on Chal. 87.

ART. 59.

A juror challenged on one side and found to be indifferent, may still be challenged on the other side. (*z*).

Jurors found indifferent on one side, may be challenged on the other.

(*z*) Co. Litt. 158 *a*; Bac. Ab. Juries, E. 11.

Chap. VII. Sec. 5.

ART. 60.

If found indifferent for cause, may be challenged peremptorily.

If a juror be challenged for cause, and found to be indifferent, he may afterwards be challenged peremptorily. (*a*)

(*a*) 6 T. R., 531; Co. Litt. 158 a.

ART. 61.

Challenges to talesmen.

Where talesmen shall be added and annexed to a jury panel under the provisions of Article 17 of Chap. VI. of this Act, the Queen by any one thereto authorized or assigned by the Court, and the accused may have their respective challenges to such talesmen. (*b*)

(*b*) See 6 Geo. IV., c. 50, s. 37.

ART. 62.

No juror who has been challenged on the original panel shall be sworn upon any tales. (*c*)

(*c*) 1 Chitt. C. L. 520, 550.

ART. 63.

Where talesmen are added to a jury panel, the accused may challenge peremptorily any of the jurors returned upon the original panel, who were before challenged, admitted and sworn, but cannot challenge them for cause, unless the ground of challenge arose after the original swearing. (*d*)

(*d*) 2 Hale, 270; 1 Chitty's C. L. 550.

ART. 64.

A prisoner can only challenge peremptorily so many talesmen as will complete the number of 20 in case of felony, and 35 in case of treason, when added to the challenges made to the original jury.

ART. 65.

Where talesmen are added to a jury panel, it shall be at the option of the accused to waive any peremptory challenge before made by him to any juror returned upon the original panel, and, if he will, to challenge such juror for cause; and in case of such waiver, such juror shall be admitted and sworn, unless, where the accused shall challenge him for cause, the ground of such challenge shall be valid.

ART. 66.

Illness of juror.

Where, on account of the illness of a juror, or other cause, as hereinafter in Section 10 of this Chapter is mentioned, a jury is discharged and a fresh one immediately returned, consisting partly of persons sworn upon the former jury, and partly of new persons, or, instead of the jury being discharged, where another, or other juror or jurors (as the case may be) is or are, with the consent of the accused, added to those continuing capable of acting upon the jury, the accused is entitled to his original right of challenging as to the whole. (*e*)

(*e*) 4 Taunt. 309.

ART. 67.

Default.

Under the authority of the Court a defective jury panel may be amended, and a corrected list delivered under the provisions of Article 3 of Chapter IV. of this Act. (*f*)

(*f*) 1 East's P. C. 113, 114.

Chap. VII. Sec. 6.

SECTION 6.

Of Charging the Jury with the Prisoner.

ART 1.

ON an indictment for treason or felony, a full jury of unexceptionable men being obtained and sworn, the indictment is to be read to them by the proper officer of the Court, and they are to be charged to inquire whether the prisoner or prisoners, as the case may be, be guilty or not guilty, and to hearken to the evidence.

ART. 2.

Jury not to be charged to inquire

Provided that it shall not be lawful on the trial of any person for any felony not punishable with death, committed after a previous conviction for felony, to charge

the jury to inquire concerning such previous conviction, until they shall have inquired concerning such subsequent felony, and shall have found such person guilty of the same; and whenever in any indictment such previous conviction shall be stated, the reading of such statement to the jury as part of the indictment shall be deferred until after such finding. (*a*)

concerning a previous conviction till the finding for the subsequent felony.

(*a*) 6 and 7 Will. IV. c. 111, in part.

ART. 3.

Where any person shall be indicted for treason or felony, the jury empannelled to try such person shall not be charged to inquire concerning his lands, tenements, or goods, or whether he fled for such treason or felony. (*b*)

Jury not to inquire of prisoner's lands, &c.

(*b*) 7 and 8 Geo. IV. c. 28, s. 5.

ART. 4.

On an indictment or information for a misdemeanor, it is not necessary when a full jury has been obtained and sworn, to read the indictment or information, and charge the jury as in Article 1 of this Section is mentioned.

SECTION 7.

*Order of Proof.**

ART. 1.

EVERY person who shall be produced or appear as a witness, either against or for any accused party, (*a*) on a criminal charge shall, before he be permitted to depose or give any manner of evidence, first take an oath (or make such solemn affirmation as by law is receivable in place of an oath) (*b*) to depose the truth, the whole truth, and nothing but the truth.

Prisoner's witnesses.

(*a*) 1 Ann, st. 2, c. 9, s. 3. By the statute, the above provision is confined to treason or felony.
(*b*) See 3 & 4 Wm. IV., cc. 49 and 82; 1 & 2 Vic., cc. 77 and 105.

ART. 2.

Several persons being indicted, the counsel for the prosecution is entitled, with the consent of the Court, before the opening of his case, to have one acquitted whom he intends to call as a witness. (*c*)

(*c*) R. *v.* Rowland, R. & M. 401; 11 East, 313, n.; R. *v.* Owen, 9 C. & P. 83.

ART. 3.

Except as hereinafter in this Section mentioned, a person charged with any offence may be convicted upon the testimony of a single lawful and credible witness.

ART. 4.

No person shall be tried, or attainted of treason, or of misprision of treason, but by and upon the oaths and testimony of two lawful [and credible] witnesses, either both of them to the same overt act, or one of them to one, and the other of them to another overt act of the same treason; unless the party indicted and arraigned or tried shall willingly, without violence, in open Court, confess the same. (*d*)

In Treason, two witnesses required.

(*d*) 7 and 8 Wm. III. c. 3, s. 2, in part. See also 1 Edw. VI. c. 12, s. 22; 5 & 6 Edw. VI. c. 11, s. 12; and 1 & 2 P. and M. c. 10; 1 East's P. C. 128, 168; 1 Chitty's C. L. 320. So much of the 7 & 8 Wm. III. c. 3, s. 2, as provides that it shall not be necessary to have two witnesses where the party stands mute or refuses to plead, or objects peremptorily to more jurors than the law allows him to challenge, is incidentally repealed by the 7 & 8 Geo. IV. c. 28. s. 2 and 3.

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* As the principles and rules of evidence on civil and criminal cases are substantially the same, it would, we conceive, be inconvenient to incorporate them with these rules of procedure; and although rules, some of them absolute, others discretionary, may be peculiar to the wide range of criminal inquiry, yet as they constitute in themselves a distinct and extensive class, we do not think it expedient that they should be mixed up with the formal rules which constitute procedure, according to the ordinary acceptation of the word. We have, therefore, limited this branch of the Digest to the course of proceeding as regards the order of proof, and the general rules which regulate the oaths and number of witnesses, and the proof of former convictions and of depositions, and the statements of accused persons taken before justices of the peace.

Chap. VII. Sec. 7.

ART. 5.

If two or more distinct treasons of divers heads or kinds shall be alleged in one bill of indictment, one witness produced to prove one of such treasons, and another witness produced to prove another of such treasons, shall not be deemed to be two witnesses to the same treason within the meaning of the last preceding Article. (*e*)

(*e*) 7 & 8 Wm. III. c. 3, s. 4.

ART. 6.

Provided that nothing in Article 4 of this Chapter contained shall apply to any person who shall be indicted for treason in compassing, imagining, inventing, devising, or intending death or grievous bodily harm to the King or Queen for the time being in possession of the Crown of this realm, or for misprision of any such treason. (*f*)

(*f*) See 39 & 40 Geo. III. c. 93; 5 & 6 Vic. c. 51, s. 1.

ART. 7.

So in certain other cases.

No person shall be convicted of any offence contained in Article 11 or Article 12 of Section 3 of Chapter II. of the Act of Crimes and Punishments, or in Section 6 of such last-mentioned Chapter, but by and upon the oaths of two lawful and credible witnesses, unless the accused willingly, without violence, confess the same. (*g*)

(*g*) 13 Car. II. c. 1, s. 5, and c. 5, s. 2: 6 Anne, c. 7, s. 3. The latter branch of the above Article as to confession is only contained in the 13 Car. II. c. 1, s. 5.

ART. 8.

If the jury, in the cases mentioned in Articles 4 and 7 of this Section do not give credit to both witnesses, the prisoner is entitled to be acquitted. (*h*)

(*h*) 3 St. Tr. 56.

ART. 9.

Perjury.

Proof of an assignment of perjury by a single witness is insufficient. (*i*)

(*i*) 4 Black. Comm. 358; 10 Mod. 194.

ART. 10.

But it is sufficient that the assignment of perjury be directly proved by one witness, and that material, though not direct, evidence, in support of that assignment, be given by another witness. (*k*)

(*k*) 2 Russ. 545.

ART. 11.

So where the alleged perjury consists in the defendant's having contradicted what he himself swore on a former occasion, the testimony of a single witness in proof of what the defendant so swore on such former occasion will support a conviction. (*l*)

(*l*) R. *v.* Harris, 5 B. & Ald. 929.

ART. 12.

Election.

Where an offence is jointly charged against two or more, but no offence is proved against all, the prosecutor must elect to proceed against one or more than one, if there be evidence of their acting jointly, and the rest are entitled to be acquitted. (*m*)

(*m*) R. *v.* Lyn, 1 C. & P. 528.

ART. 13.

Proof of a former conviction.

When a person is indicted for any felony, not punishable with death, committed after a previous conviction for felony [or for any misdemeanor against any Article of Chapter XVIII. of the Act of Crimes and Punishments, committed after a previous conviction for any misdemeanor against any Article of that Chapter], a certificate containing the substance and effect only (omitting the formal parts) of the indictment and conviction for the previous felony or misdemeanor, purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court where the offender was first convicted, or by the deputy of such clerk or officer (for which certificate a fee of 6*s.* 8*d.*, and no more, shall be demanded or taken), shall, upon proof of the identity of the person of the offender,

be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same. (*n*)

(*n*) 7 & 8 Geo. IV. c. 28, s. 11, in part. The words between brackets have been introduced, as several of the offences in Chapter XVIII. of the Act of Crimes and Punishments are felonies by the present law. It also appears to us to be proper to extend the provisions of the 7 & 8 Geo. IV. c. 28, s. 11, to all Fraudulent Appropriations.

Art. 14.

Where, upon the trial of any person for any such offence committed after a previous conviction as in the last preceding Article is mentioned, such person shall give evidence of his good character, it shall be lawful for the prosecutor in answer thereto, notwithstanding anything in Article 2 of the last preceding Section contained, to give evidence of the indictment and conviction of such person for the previous felony, before the jury shall have found such person guilty of the subsequent felony, and such jury shall inquire concerning such previous conviction for felony at the same time that they inquire concerning the subsequent felony. (*o*)

(*o*) 6 and 7 Will. IV. c. 111, in part.

Art. 15.

The rule contained in the last preceding Article applies where the prisoner's counsel, on cross-examination, elicits from a witness for the prosecution that the prisoner has borne a good character. (*p*)

(*p*) R. *v.* Gadbury, 8 C. and P. 676.

Art. 16.

Proof of depositions of witnesses and statements of accused persons taken before justices of the peace.

Rules regulating the proof, upon the trial of accused persons, of the depositions taken against them before justices of the peace, where the persons whose depositions shall have been so taken are dead or so ill as not to be able to travel, and of the statements of accused persons made to justices of the peace, are contained in Articles 3, 4, 5, 6, 7, and 8, of Section 5 of Chapter I. of this Act.

Art. 17.

Variance.

No variance in proof from the allegations contained in any indictment or information shall be deemed to be material where it shall occur in respect of the specification of the time or place when or where the offence charged has been committed, unless the time or place be itself material to the description of such offence or to the jurisdiction of the Court; neither shall any such variance be deemed to be material where it shall occur in respect of any allegation of any matter or circumstance the allegation of which is not material to the charge; or although it shall occur in the description of something which is material to the charge, unless it be so material to its identity that if the description be true the offence charged cannot be the same with that proved, (*q*) or where the acts or circumstances charged and proved are legally identical. (*r*)

(*q*) See the 8th Report of the Criminal Law Commissioners, p. 15. If the indictment charge a robbery committed against A. B., the said A. B. being dressed in black, he may be convicted, although it turn out that A. B. was dressed in blue, for the variance is as to a circumstance not at all material to the charge; but if the indictment were for stealing a black horse, and the proof were of taking a white one, the variance would be fatal; for if the description in the indictment be true, the offences cannot be the same: it is a variance which cannot be reconciled by averment.

(*r*) If it be alleged that A. gave a mortal stroke, and that B. was aiding and abetting, and it appeared that B. gave the stroke and that A. was aiding and abetting, the variance is not material, for the act of one is in law the act of both. 1 Hale, 437–8, 462, 521; 1 Haw. P. C. b. 2, c. 46, s. 39; Fost. 351.

Art. 18.

Although by mistake not discovered before the case for the prosecution is closed, evidence has been given applicable to a different indictment, the evidence applicable to the indictment which the jury are sworn to try, may be gone into. (*s*)

(*s*) R. *v.* Wardle, 1 C & M. 144.

Art. 19.

Amendment of variance between written or printed evidence and the record.

Any Judge sitting at Nisi Prius, or any Court of oyer and terminer or general gaol delivery, if such Court or Judge shall see fit so to do, may cause the record in any indictment or information, when any variance shall appear between any matter in writing or in print, produced in evidence, and the recital or setting forth thereof in the indictment or information whereon the trial is pending, to be forthwith amended in such particular by some officer of the Court, on payment of such costs (if any) to the other party as such Judge or Court shall think reason-

Chap. VII. Sec. 7.

able; and after such amendment the trial shall proceed in the same manner in all respects, both with regard to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the postea and returned, together with the record, and thereupon the papers, rolls, and other records of the Court from which such record issued shall be amended accordingly. (*t*)

(*t*) This Article is compounded of the 9 Geo. IV. c. 15; and 11 and 12 Vic. c. 46, s. 4. It will be observed that the powers given by the above Article do not extend to Courts of quarter sessions; but we think they ought.

Chap. VII. Sec. 8.

SECTION 8.

Of Counsel.

ART. 1.

A PROSECUTOR who conducts his case in person, and who is to be examined as a witness, has no right to address the jury as counsel. (*a*)

(*a*) R. *v.* Milne, 2 B. & A. 606, n.; R. *v.* Brice, 2 B. & A. 606.

ART. 2.

Full defence by counsel. Treason.

Every person tried for treason, or misprision of treason, shall be admitted [after the close of the case for the prosecution] to make full answer and defence thereto by counsel learned in the law. (*b*)

(*b*) 7 & 8 Will. III. c. 3, s. 1, in part.

ART. 3.

Other offences.

So every person tried for felony or misdemeanor shall be admitted after the close of the case for the prosecution, to make full answer and defence thereto by counsel learned in the law, or by attorney in Courts where attorneys practice as counsel. (*c*)

(*c*) See 6 and 7 Will IV. c. 114, s. 1, as to persons tried for felony.

ART. 4.

Every person tried for treason shall be entitled, under the provisions of Article 2 of this Section, to employ two counsel, if he so desire. (*d*)

(*d*) See 7 and 8 Will. III. c. 3, s. 1, in part; East's P. C. c. 111. By the present law, such counsel are to be assigned by the Court on the application of the accused. But it is unnecessary any longer to require that they should be *assigned* by the Court, since the alteration in the law, which allows persons tried for felony to make their full defence by counsel, and as regards whom it is not required that their counsel should be assigned by the Court.

ART. 5.

Both the counsel of a person tried for treason may address the jury, although such person call no witnesses. (*e*)

(*e*) Steph. C. L. 304.

ART. 6.

A prisoner's counsel shall have free access to him at all seasonable hours. (*f*)

(*f*) See 7 and 8 Will. III. c. 3, s. 1, as to persons indicted for treason and misprision of treason.

ART. 7.

Where the accused conducts his own defence, he may be heard by counsel on any question of law. (*g*)

(*g*) R. *v.* White, 3 Camp. 98.

ART. 8.

An accused person cannot claim, as of right, to address a jury by counsel, and also in person. (*h*)

(*h*) R. *v.* Boucher, 8 C. and P. 141; R. *v.* Burrows, 2 M. and R. 124. He may as of favour, R. *v.* Malings, 8 C. and P. 242; R. *v.* Walkling, 5 C. and P. 243; R. *v.* Rider, 8 C. and P. 531. In a trial for perjury, R. *v.* Parkins, 1 C. and P. 548, Abbot, L. C. J. permitted a defendant to address a jury, and cross-examine witnesses, and his counsel to argue points of law, and suggest questions for cross-examination.

ART. 9.

Mode of conducting defence by counsel.

Where a witness for the Crown has made a deposition before a justice of the peace, he cannot, upon his cross-examination by the prisoner's counsel, be asked whether he did or did not in his deposition make such or such a statement, until

the deposition itself has been read, in order to manifest whether such statement is or is not contained therein, and such deposition must be read as part of the evidence of the cross-examining counsel. (*i*)

(*i*) The rules contained in this and the next four succeeding Articles were laid down by the judges soon after the passing of the Prisoners' Counsel Act (6 and 7 Will. IV. c. 114).

ART. 10.

After such deposition as in the last preceding Article is mentioned, has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in Court and his former deposition; after which the counsel for the prosecution may re-examine the witness, and after the prisoner's counsel has addressed the jury, will be entitled to the reply; and in case the counsel for the prisoner comments upon any supposed variance or contradiction without having read the deposition, the Court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it.

ART. 11.

The witness cannot, in cross-examination, be compelled to answer whether he did or did not make such a statement before the justice of the peace, until after his deposition has been read, and it appears that it contains no mention of such statement; in that event the counsel for the prisoner may proceed with his cross-examination, and if the witness admits such a statement to have been made, he may comment upon such omission, or upon the effect of it upon the other part of his testimony; or if the witness denies that he made such statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply.

ART. 12.

If the only evidence called on the part of the prisoner is evidence to character, although the counsel for the prosecution is entitled to the reply, it will be a matter for his discretion whether he will use it or not; cases may occur in which it may be fit and proper so to do.

ART. 13.

Reply.

In cases of public prosecutions for felony, instituted by the Crown, the law officers of the Crown, and those who represent them, are entitled to the reply, although no evidence is produced on the part of the prisoner. (*k*)

(*k*) See Ann Gardner's case, 1 Car. and Ker. 628.

ART. 14.

If two be jointly indicted for the same offence, and one only call witnesses, the prosecutor's counsel may reply as to both. (*l*). It is otherwise if the offences be separate: the counsel for the prosecution is in such case to confine himself to the case of the party who has called witnesses. (*m*)

(*l*) R. *v.* Hayes, 2 M. and R. 155.
(*m*) Ib.

SECTION 9.

Illness or Insanity of Prisoner.

ART. 1.

Illness.

IF during the trial a prisoner be taken so ill as to be incapable of remaining at the bar on his defence, the jury may be discharged, and, on his recovery, he may be tried by another jury. (*a*)

(*a*) R. *v.* Stevenson, 2 Leach's C. C. L. 546.

ART. 2

A prisoner, whose trial is interrupted by illness, may, in case of his recovery, be put on his trial again at the same assizes or sessions. (*b*)

(*b*) R. *v.* Streek, 2 C. and P. 413.

ART. 3.

Insanity.

In all cases where it shall be given in evidence upon the trial of any person charged with any offence, that such person was insane at the time of the com-

Chap. VII. Sect. 9.

mission of such offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether such person was acquitted by them on account of such insanity; and if they shall find that such person was insane at the time of committing such offence, the Court before whom such trial shall be had shall order such person to be kept in strict custody, in such place and in such manner as to the Court shall seem fit, until Her Majesty's pleasure shall be known; and it shall thereupon be lawful for Her Majesty to give such order for the safe custody of such person during her pleasure, in such place and in such manner as to Her Majesty shall seem fit. (*c*)

(*c*) 39 and 40 Geo. III. c. 94, s. 1; 3 and 4 Vict. c. 54, s. 3.

ART. 4.

Insane persons indicted for any offence appearing to be insane on their trial, &c., shall be ordered by the Court, &c. to be kept in custody till Her Majesty's pleasure be known.

If upon the trial of any person indicted for any offence, such person shall appear to the jury charged with such indictment to be insane, it shall be lawful for the Court before whom any such person shall be brought to be tried, to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody until Her Majesty's pleasure shall be known: and if any person charged with any offence shall be brought before any Court to be discharged for want of prosecution, and such person shall appear to be insane, it shall be lawful for such Court to order a jury to be empanelled to try the sanity of such person; and if the jury so empanelled shall find such person to be insane, it shall be lawful for such Court to order such person to be kept in strict custody, in such place and in such manner as to such Court shall seem fit until Her Majesty's pleasure shall be known; and in all cases of insanity so found, it shall be lawful for Her Majesty to give such order for the safe custody of such person so found to be insane, during her pleasure, in such place and in such manner as to Her Majesty shall seem fit. (*d*)

(*d*) 39 and 40 Geo. III. c. 94, s. 2. Bac. Ab. tit. Idiot B.; 1 Hale, 35, 36; 18 St. Trials (Howell's Ed. 411.)

ART. 5.

The rules contained in Articles 12 and 13 of Section 1 of Chapter V. of this Act shall apply to juries empanelled under the provisions of the last preceding Article, as well as to juries empanelled under Article 11 of that Section.

SECTION 10.

Chap. VII. Sec. 10.

Adjournment of Trial—Discharge of Jury, &c.

ART. 1.

WHERE the trial cannot be concluded in one day, the Court, at discretion, may adjourn to the next morning, or the next but one, if the next day be Sunday, and so on from day to day, the jury being kept together so as to have no communication but with each other. (*a*)

(*a*) 6 T. R. 527; 1 Chitty's C. L. 313.

ART. 2.

But the separation of the jury, on an adjournment in the course of a trial for a misdemeanor, does not vacate the verdict. (*b*)

(*b*) R. *v.* Kinnear, 2 B. and Ald. 462.

ART. 3.

Should a juror die, or become incapable of acting as such before the verdict, another juror may, by consent of the accused, be added to the eleven, who are to be re-sworn. (*c*)

(*c*) Edward's Case, Russ. and Ry. C. C. 224; 2 B. and Ald. 462; Streek's Case, 2 C. and P. 413; 1 Chitty's C. L. 629, 630.

ART. 4.

Or the jury may be discharged, and a fresh jury charged. (*d*)

(*d*) Russ. and Ry. C.C. 224; 2 C. and P. 413; 1 Chitty's C. L. 629, 630.

ART. 5.

The trial must proceed, although in the course of the trial it be discovered that one of the jurors is related to the party on his trial. (*e*)

(*e*) R. *v.* Wardle, 1 Car. and Marsh. 647.

ART. 6.

Discharge of jury for defect in indictment.

It is at the discretion of a judge at nisi prius to take notice of a defect on the face of the record, and to discharge the jury from trying it when the indictment is clearly so defective that no judgment upon it could be given against the party charged. (*f*)

(*f*) Rex *v.* Tremearne, 5 D. and R. 413; R. and M. N. P. R. 147; Rex. *v.* Deacon, R. and M. N. P. R. 27.

ART. 7.

A jury may be discharged by order of the Court, on the application of the accused, grounded on such circumstances as satisfy the Court that the postponement of his trial is essential to the proper making of his defence. (*g*)

(*g*) See R. *v.* Stokes, 6 C. and P. 151.

ART. 8.

A jury sworn and charged in a capital case cannot be discharged without the prisoner's consent, before they have given a verdict. (*h*)

(*h*) Haw. P. C. b. 2, c. 47, s. 1; Foster, 29 to 39.

ART. 9.

But although the witnesses for the prosecution have all been examined, the Court may direct another trial to be proceeded with, in order to give time for the production of a thing essential to the proof, which has been deposited at a distance. (*i*)

(*i*) R. *v.* Wenborn, 6 Jur. 267.

SECTION 11.

*Verdict.**

ART. 1.

IN all cases of treason or felony the jury must give their verdict in open Court, and in the presence of the accused. (*a*)

(*a*) Haw. P. C. b. 2, c. 47, s. 2. The authority says, in all capital cases, but we think the same rule should be applicable to all felonies.

ART. 2.

The assent of all the jury to a verdict pronounced by their foreman in the presence and hearing of the rest is to be conclusively presumed. (*b*)

(*b*) 2 Starkie's C. 111.

ART. 3.

The jury are at liberty to find either a general or special verdict. (*c*)

(*c*) 4 Black. Comm. 361; 1 Chitty's C. L. 637, 642.

ART. 4.

If an indictment charge the accused with treason, and the jury by their verdict find facts which amount to a felony or misdemeanor only, no judgment can be pronounced. (*d*)

(*d*) 1 Leach, 14; 2 Str. 1133; 1 Leach, 702; 2 East, P. C. 737–778. So by the present law if an indictment charges felony, and the jury by their verdict find facts which amount to a misdemeanor only, no judgment can be pronounced; but now that it is proposed to abolish the distinction between felonies and misdemeanors, except for the purpose of classification, there will no longer be any objection to allowing a jury to find facts amounting to a misdemeanor only upon a charge of felony, where the latter includes the former, and the evidence warrants such finding. The next Article provides for this, and renders unnecessary any special provision like the one contained in Article 13 of Section 10 of Chapter VII. of the Act of Procedure. That Article is as follows:—

"ART. 13.

Assault against the person where included in a felony.

"On the trial of any person for any felony, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding. (†)

"(†) 7 Will IV. and 1 Vict. c. 85, s. 11, in part."

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* We are not satisfied as to the expediency of requiring the verdict of a jury to be unanimous; at all events, we think that some modification of the present rule which requires unanimity in the case of an acquittal might be made with advantage. We beg to refer to the valuable evidence on the subject of unanimity of juries, which is contained in the Appendix to the Eighth Report of the Criminal Law Commissioners.

ART. 5.

Variance.

In case of failure to prove the crime alleged in the indictment, the defendant may (subject to the rule contained in the last preceding Article), if the evidence be sufficient, be convicted of any crime included in the crime so alleged. (*e*)

(*e*) Leach, 339; n. a; 1 Chitty's C. L. 217.

ART. 6.

Provided that a verdict, finding the accused guilty of a less aggravated offence, included in a charge of one more aggravated, without any finding as to the latter, shall be deemed to be insufficient. (*f*)

(*f*) Haw. P. C. b. 2, c. 47, s. 5. Qy. as to this rule.

ART. 7.

The rule contained in Article 5 applies, although the failure to prove the whole of the crime alleged arise from variance in point of local description. (*g*)

(*g*) Leach, 252–339, n. a.

ART. 8.

Where several persons are jointly charged with any offence, one or more of them may be convicted of such offence, if the evidence and the nature of the offence warrant such conviction, and another or others of them may be acquitted.

ART. 9.

Where several persons are jointly charged with an aggravated offence which includes any more simple offence, one or more of such persons may, subject to the rule contained in Article 4 of this Section, be convicted of the former, and another or others of them may be convicted of the latter offence, in case the evidence warrant such conviction. (*h*)

(*h*) R. *v.* Butterworth, Russ. and Ry. 520.

ART. 10.

Compassing to levy war against the Queen, &c.

If the facts or matters proved on the trial of any person indicted for any felony against Article (*k*) of Section 3 of Chapter II. of the Act of Crimes and Punishments shall amount in law to treason, such person shall not by reason thereof be entitled to be acquitted of such felony. (*i*)

(*i*) 11 and 12 Vic. c. 12, s. 7, in part. This Act reduces treason in compassing to levy war against the Queen, &c. &c., to felony; and having been passed since the making of the Report which contains the Act of Crimes and Punishments, that Act has no Article on the subject.

ART. 11.

Obtaining by false pretences.

If upon the trial of any person indicted for obtaining any moveable thing by any false pretence it shall be proved that he obtained such thing in any such manner as to amount in law to theft, he shall not by reason thereof be entitled to be acquitted of such first-mentioned offence. (*k*)

(*k*) See 7 and 8 Geo. IV. c. 29, s. 53, in part.

ART. 12.

Concealment of birth.

If a woman tried for the murder of her child shall be acquitted thereof, it shall be lawful for the jury by whose verdict she shall be acquitted, to find, in case it shall so appear in evidence, that she was delivered of a child, and that she did, by some secret disposition of the dead body of such child, endeavour to conceal the birth of such child, and thereupon the Court may pass such sentence as if she had been convicted upon an indictment for the concealment of the birth. (*l*)

(*l*) 9 Geo. IV. c. 31, s. 14, in part. We have not omitted the above Article as the provisions are so constantly acted under, although we have elsewhere expressed a strong opinion against the anomaly of it. It should be observed that since, if our suggestions as regards the doing away with the distinction between felonies and misdemeanors be adopted, a count for concealing the birth may henceforth be joined in the same indictment with a count for murder, the full benefit of the above Article would be obtained in a much less objectionable manner.

ART. 13.

On trials for libels, the jury may give a general verdict upon the whole matter put in issue.

On the trial of any indictment or information for the making or publishing of any libel, where any issue is joined between the Queen and any defendant, on the plea of "not guilty" pleaded, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information; and shall not be required or directed by the Court or Judge before

whom such indictment or information shall be tried, to find the defendant guilty, merely on the proof of the publication by such defendant of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information. (*m*)

(*m*) 32 Geo. III. c. 60, s. 1.

ART. 14.

Provided that on every such trial the Court or Judge before whom such indictment or information shall be tried shall, according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue between the Queen and the defendant, in like manner as in other criminal cases. (*n*)

But the Court shall give their opinion upon the whole matter put in issue, as in other criminal cases.

(*n*) 32 Geo. III. c. 60, s. 2.

ART. 15.

Provided also, that nothing in the last two preceding Articles contained shall extend to prevent the jury from finding a special verdict, in their discretion, as in other criminal cases. (*o*)

Jury may find a special verdict.

(*o*) 32 Geo. III. c. 60, s. 3.

ART. 16.

The verdict, when delivered, is to be entered on record by the proper officer of the Court.

ART. 17.

A verdict is not vitiated by surplusage. (*p*)

Verdict.

(*p*) Haw. P. C. b. 2, c. 47, s. 10.

ART. 18.

The Court may, before the verdict is recorded, but not afterwards, direct the jury to reconsider their verdict. (*q*)

(*q*) Haw. P. C. b. 2, c. 47, s. 11; 1 And. 104; Cromp. 114; Aleyn, 12; 2 St. Tr. 60.

ART. 19.

Provided that although a verdict be recorded, yet if it appear promptly that it is not in accordance with the intention of the jury, it may forthwith be corrected. (*r*)

Amendment.

(*r*) R. *v.* Parkin, 1 R. and M. C. C. 45.

ART. 20.

Where the trial is at Nisi Prius, the *postea* may be amended on sufficient cause shown, where there is a judge's note, or other sufficient document to show that it is incorrect. (*s*)

(*s*) R. *v.* Verrier, 12 Ad. and Ell. 317.

SECTION 12.

Discharge of Prisoners.

ART. 1.

EVERY prisoner charged with any crime, or as an accessory thereto before any Court of Criminal jurisdiction in England, against whom no bill of indictment shall be found by the grand jury, or who, on his trial, shall be acquitted, or who shall be discharged by proclamation for want of prosecution, shall be immediately set at large in open Court, without the payment of any fee or sum of money to the sheriff, gaoler, or keeper of the gaol or prison, from whence he shall be so discharged and set at liberty for or in respect of such discharge (*a*); and it shall not be lawful for any person whomsoever to demand or take from any person so charged against whom no bill of indictment shall be so found, or who shall be so acquitted or discharged, any fee for his appearance to the indictment or information, or for allowing him to plead thereto, or for recording his appearance or plea, or for discharging any recognizance taken from any such person or any surety or sureties for any such person. (*b*)

Prisoners charged with a felony or other crimes in England, for want of prosecution, to be set at large, without payment of any fees.

(*a*) 14 Geo. III. c. 20.
(*b*) 55 Geo. III. c. 50, s. 4, explained by 8 and 9 Vict. c. 114, s. 1.

Chap. VIII. Sec. 1.

CHAPTER VIII.

PROCEEDINGS SUBSEQUENT TO TRIAL AND BEFORE JUDGMENT.

SECTION 1.

Process.

ART. 1.

IF a defendant be under recognizance to appear to receive sentence in the Court of Queen's Bench, notice of the intention to bring him up for judgment on a day specified is to be served on such defendant and his bail, and in default of appearance after such notice served and appearance required according to the course and practice of the Court, the recognizance may be estreated, and a warrant, or where it is intended to proceed against him to outlawry, a writ of *capias ad satisfaciendum*, may be issued for the apprehension of the defendant. (*a*)

(*a*) Corner's P. 152.

ART. 2.

If upon judgment entered for the Crown upon an indictment or information pending in the Court of Queen's Bench the defendant be not under recognizance to appear to receive sentence, he may be served with notice to appear on a day specified, or a writ of *capias ad satisfaciendum* may be issued, and if he cannot be found, he may be proceeded against to outlawry. (*b*)

(*b*) Corner's P. 152.

ART. 3.

If a defendant be convicted upon an indictment or information pending in the Court of Queen's Bench, and be not under recognizance or under sufficient recognizance to appear to receive the sentence of the Court, or if he be likely to abscond, a judge's warrant may be issued to hold him to bail, or to give such further bail as to the judge in his discretion may seem fit, upon a certificate of conviction by the clerk of assize, and a certificate of his not being under recognizance from the Crown Office; or, if he be under recognizance, upon affidavit showing the necessity for further bail. In the latter case the defendant is to be summoned to show cause why further bail should not be put in, or served with notice that unless he puts in further bail a warrant will be applied for. (*c*)

(*c*) Corner's P. 151.

ART. 4.

A writ of *capias ad satisfaciendum* is not issuable from the Court of Queen's Bench after conviction for a misdemeanor where the defendant is under recognizance to appear to receive sentence, or where, before judgment signed, he enters into a recognizance, according to the course and practice of the Court, to appear to do so on the fifth day of the next term or whensoever he shall be thereto required. (*d*)

(*d*) Corner's P. 152.

ART. 5.

In all cases where it is necessary that the defendant should be present in Court when judgment is pronounced against him, if such offender shall be at large, and will not voluntarily attend in Court, such and the like process, under and subject to such and the like rules and regulations, shall issue against him for the purpose of bringing him into Court to receive judgment as may be issued for the purpose of bringing an offender into Court to answer to an indictment found or information filed against him; and he shall be liable to be prosecuted to outlawry, as in that case he may be. (*e*)

(*e*) 4 Black. Com. p. 375; Chitty's Burn's Just. titles "Judgment" and "Process;" 1 Ch. C. L. 691. But see Dickinson's Quarter Sessions, by Talfourd, as to the power of the sessions to issue a *capias ad satisfaciendum*.

SECTION 2.

Motion for New Trial, &c.

ART. 1.

New trial, within what time to be moved for.

WHERE an offender shall have been convicted of any misdemeanor on any prosecution pending in the Court of Queen's Bench, it shall be lawful for such offender, at any time before the expiration of four days; (*a*) or, in the cases provided for by Article 3 of Section 1 of Chapter IX., at any time before the expiration of six days, after the commencement of the ensuing term, (*b*) to move for, and for the Court, in its discretion, to grant a new trial, or to award a writ of *venire facias de novo*.

(*a*) R. *v.* Holt, 5 T. R. 486.

(*b*) 1 Chitty's C. L. 654, *et seq.*; Chitty's Burn's Just., tit. "New Trial." No new trial can be granted in any case of felony, R. *v.* Mawby, 6 T. R. 638.

ART. 2.

Although a party be not, in strictness, entitled to be heard on a motion for a new trial, the motion not having been made within the time limited by the rules of the Court of Queen's Bench, or by reason of the omission of any ordinary form, the Court will in its discretion hear arguments to satisfy them in the performance of their duty that justice has not been done, and so as in effect to give the party the benefit which might have been derived from moving for a new trial. (*c*)

(*c*) 11 East, 309; 1 Chitty's C. L. 659; R. *v.* Holt, 5 T. R. 486; and see the observations of Le Blanc, J., in R. *v.* Askew, 3 M. & S. 10, as to the rule requiring all the defendants to be in Court at the time of moving for a new trial.

ART. 3.

In what cases.

A new trial may be allowed by the Court of Queen's Bench, upon a prosecution for a misdemeanor, on the application of a defendant, on the ground that the prosecutor has omitted to give due notice of trial, or that the verdict is contrary to evidence or the directions of the judge, or for the improper reception or rejection of evidence, (*d*) or other mistake or misdirection on the part of the judge, or misconduct on the part of the jury, (*e*) or where for any other cause it shall appear to the Court that the awarding a new trial is essential to justice. (*f*)

(*d*) It has been held that although it appear that evidence has been received which ought not to have been received, yet that if the judges are of opinion that there is ample evidence to support the indictment after rejecting such improper evidence, they will not award a new trial, R. *v.* Ball, R. & R. C. C. 332; 1 Camp. 324; R. *v.* Olroyd, R. & R. C. C. 88; R. *v.* Tinckler, 1 East's P. C. 354. The rule appears to be otherwise in civil cases, and ought, we think, to be the same in criminal cases. See Lord Denman's observation's in Wright *v.* Roe *dem.* Tatham, 7 Ad. & E. 330; Crease *v.* Barrett, 1 C. M. & R. 919; 5 Tyr. 456; and De Rutzen *v.* Farr. 4 Ad. & Ell. 53.

(*e*) If after the jury have retired one of them separate himself from the rest, and converse with a stranger, the verdict is bad, R. *v.* Fowler, 4 B. & A. 273.

(*f*) Hawk. P. C. b. 2, c. 47, s. 12; 1 Chitty's Crim. L., p. 654-658; 2 Tidd, 906; Steph. C. L. 104.

ART. 4.

Venire facias de novo, in what cases.

A writ of *venire facias de novo* may be awarded by the Court of Queen's Bench where the jury have been improperly chosen, or irregularly returned, or a challenge has been improperly disallowed, or where, by reason of misconduct on the part of the jury, or of some uncertainty or ambiguity or other imperfection in their verdict, or of any other irregularity or defect in the proceedings or trial, appearing on the record, the proper effect of the first writ of *venire* has been frustrated, or the verdict become void in law. (*g*)

(*g*) 2 Tidd, 922; 1 Chitty's C. L. 655. See Witham *v.* Lewis, 1 Wils. 48.

ART. 5.

Provided that, as a general rule, and except in cases where manifest injustice would otherwise ensue, no motion for a new trial, or for a writ of *venire facias de novo* can be made, after the offender shall have alleged any matter or thing in arrest or bar of judgment. (*h*)

(*h*) 1 Chitty's C. L. 658; 2 Tidd, 912-13.

ART. 6.

Presence of offender.

No motion for a new trial shall be allowed unless the offender, or, if more than one, all the offenders who shall have been convicted, shall be present in Court

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at the time of the making of such motion: Provided that where the misdemeanor of which he or they shall have been convicted, shall be punishable by a simple fine only, the Court may, if it shall seem to be just, dispense with his or their presence. (*i*)

(*i*) 1 Chitty's C. L. 659; R. *v.* Teale, 11 East, 307; R. *v.* Askew, 3 M. & S. 9; R. *v.* Ld. Cochrane, 3 M. &. S. 10; R. *v.* Scully, 1 Alcock & Napier, 262. The prosecutor's counsel has no power to dispense with the rule. R. *v.* Fielder, 2 D. and R. 46.

Qy. whether the Court, according to the present practice, can dispense with the presence of the defendant in all cases. See R. *v.* Boltz, 6 D. & R. 65.

ART. 7.

Provided also that an offender in the actual custody of the marshal on crimina process need not be present when a motion is made for a new trial. (*k*)

(*k*) R. *v.* Hollingberry, 4 B. & C. 329; 6 D. & R. 344.

ART. 8.

New trial, where some defendants convicted, others acquitted.

Where one or more of several defendants shall have been convicted and another or others acquitted, a new trial may be granted as to the former only. (*l*).

(*l*) 6 T. R. 638, 640; 1 Chitty's C. L. 659; R. *v.* Teale, 11 East, 307.

ART. 9.

New trial on motion of prosecutor.

Where a party shall have been acquitted of any misdemeanor on a prosecution pending in the Court of Queen's Bench, it shall be lawful for the prosecutor, within the like time, and under and subject to the like rules as are requisite in case of motions for new trials by convicted offenders so far as the same are applicable, to move for, and for the Court to allow a new trial to be had in the following cases, viz.:—

Where the party acquitted shall have neglected to give due notice of trial, or shall have kept back any witness on the part of the prosecutor, or obtained an acquittal by any other fraudulent means or practice. (*m*)

(*m*) 1 Chitty's C. L. 657. A new trial is not grantable in any other case after an acquittal on an indictment, semble R. *v.* Sutton, 5 B. and Ad. 52; R. *v.* Brice, 2 B. and Ad. 606; R. *v.* Mann, 4 Mau. and Sel. 337; R. *v.* Cohen, 1 Starkie's C. 516; R. *v.* Cotterill, 1 B. and A. 67; R. *v.* Reynell, 6 East, 315.

ART. 10.

A verdict for a prisoner on a special plea in bar cannot be set aside, although it be against evidence and the judge's direction. (*n*)

(*n*) R. *v.* Lea, 2 Moody's C. C. 9.

ART. 11.

Affidavits of jurors are not admissible to explain their verdict, or their reasons for giving it.

ART. 12.

But such affidavits are admissible to repel charges of misconduct on the part of the jury. (*o*)

(*o*) Cornish *v.* Dakin, Exch. East. T. 1845; Handiwicke *v.* Hopkins, 14 Law Journal.

ART. 13.

Effect of new trial or writ of *venire facias de novo*.

On a motion for a new trial allowed, or a writ of *venire facias de novo* awarded, the parties stand in the state in which they were immediately before the first trial: the whole is to be reheard, and the first verdict cannot be made use of either as evidence of any matter found by such verdict or in argument. (*p*)

(*p*) See Livingstone's Code of Procedure, Art. 403.

ART. 14.

Suspension of entering up of judgment.

Where a party shall have been convicted or acquitted of any misdemeanor on a prosecution pending in the Court of Queen's Bench, it shall be competent to the Court to suspend the entering up of judgment where it shall deem such suspension to be just, with a view to any other proceeding commenced or about to be commenced, provided that application be made for such suspension within the time limited in Article 1 of this Section. (*q*)

(*q*) R. *v.* Inhab. of Oxfordshire, 16 East, 223; R. *v.* Inhab. of County of Southampton, 2 Chitty; Rep. 215; R. *v.* Wandsworth, 1 B. and Ald. 63; R. *v.* Barbon, 5 M. and Selw. 322; 1 Chitty's C. L. 660; Chitty's Burn's Just., tit. "Judgment."

ART. 15.

The indictment of a witness for perjury is not a sufficient ground for postponing judgment against a party convicted. (*r*)

(*r*) R. *v.* Haydon, 1 Wm. Black. 404; 3 Burr. 1387.

ART. 16.

Inferior Courts cannot award writs of *venire facias de novo* on merits.

No inferior Court of criminal jurisdiction has power to award a writ of *venire facias de novo* upon the merits, but only on account of some irregularity apparent upon the face of the record. (*s*)

(*s*) 13 East, 416, n. (b); 1 Chitty's C. L. 657.

SECTION 3.

Arrest of Judgment.

ART. 1.

Within what time motion in arrest to be made in the Queen's Bench.

A MOTION in arrest of judgment in the Court of Queen's Bench is, in the ordinary course, to be made within the same time as is allowed for moving for a new trial, but may be allowed when the defendant is called up to receive sentence. (*a*)

(*a*) The Court usually grants leave on motion made within the usual time, that the motion may be made on bringing the party up for judgment. Corner's P. 162.

ART. 2.

Presence of party.

A party convicted of treason or felony must be present in Court, in order to move in arrest of judgment. A party convicted of a misdemeanor must also be present for the same purpose, unless his presence be dispensed with at the discretion of the Court. (*b*)

(*b*) As to capital offences, and as it seems in regard of all felonies, see R. *v.* Spraggs, 2 Burr. 930; 1 W. Bl. 269; indictments removed by *certiorari*, ib.; R. *v.* Cowle, 2 Burr. 834; 2 Ld. Ken. 519. The principle is, that a party is not to be heard who refuses to submit himself to the judgment of the law.

ART. 3.

Party, how to be disposed of in mean time.

If, where a party convicted of any offence punishable with death moves in arrest of judgment, the Court takes time to consider of the judgment, he is to be committed to prison in the mean time. Where a party convicted of any other offence moves in arrest of judgment, and the Court takes time to consider of the judgment, such Court may, in its discretion, commit such party to prison in the mean time, or (with the consent of the prosecutor) (*c*) take a recognizance of bail, with one or two sufficient sureties, and in such sum as the Court shall think fit, conditioned to appear at such time or times as the Court shall direct, and receive judgment.

(*c*) R. *v.* Waddington, 1 East, 159.

ART. 4.

In what cases judgment may be arrested.

Judgment for an offence is to be arrested where the offender has received a pardon since his arraignment, (*d*) such arrest being, however, subject to the like rules and regulations as are applicable where a pardon is pleaded upon arraignment, so far as the same may be applicable. (*e*) Provided that no conviction of treason or felony shall be deemed to be included in any pardon unless such conviction be therein particularly mentioned; (*f*) and that no property which the offender has forfeited by his conviction be revested in him by any pardon, without express words of restitution. (*g*)

(*d*) 4 Black. Comm. 402; Step. C. L. 290, 321.
(*e*) Ib.
(*f*) Hawk. P. C. b. 2, c. 37, s. 8; 4 Black. Comm. 400; 1 Chitty's C. L. 770.
(*g*) Hawk. P. C. b. 2, c. 35, s. 54; Chitty's Burn's Just., tit. "Pardons."

ART. 5.

Judgment may also be arrested upon defects apparent (*h*) in any part (*i*) of the record, and which regard either the jurisdiction of the Court, the statement of the offence, (*k*) or any of the proceedings thereupon. (*l*)

(*h*) Sutton *v.* Bishop, 4 Burr. 2287; Truscott *v.* Carpenter, 1 Ld. Raym. 231.
(*i*) 1 Chitty's C. L. 662; Chitty's Burn's Just., tit. "Judgment."
(*k*) 4 Black. Comm. 375; Chitty's Burn's Just., titles "Indictment," and "Judgment," and cases there cited.
(*l*) Chitty's C. L. 662; Chitty's Burn's Just., tit. "Judgment."

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ART. 6.

Provided that if the facts or matters alleged in any indictment for any felony under Article of Section 3 of Chapter II. of the Act of Crimes and Punishments shall amount in law to treason, such indictment shall not by reason thereof be deemed void, erroneous, or defective. (*m*)

(*m*) 11 and 12 Vic. c. 12, s. 7, in part. This Act reduces treason in compassing to levy war against the Queen, &c., to felony; and having been passed since the making of the Report containing the Act of Crimes and Punishments, that Act has no Article on the subject.

ART. 7.

Provided also that no judgment, after conviction on any indictment or information, whether it be by verdict or outlawry, or by confession, default, or otherwise, shall be arrested for want of the averment of any matter unnecessary to be proved, or for that any person mentioned in this indictment or information is designated by a name of office or other descriptive appellation instead of his proper name, or for the want of certainty in the description of the offence where the matter charged, if true, plainly shows the accused to be guilty of a crime in point of law, and that the Court had jurisdiction to try such crime. (*n*)

(*n*) This is an extension of the stat. 7 Geo. IV. c. 64, s. 20.

ART. 8.

Provided also that no such judgment as in the last preceding Article is mentioned shall be arrested by reason that the jury process has been awarded to a wrong officer upon an insufficient suggestion, nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors, or because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer; or by reason of any miscontinuance or discontinuance of process, unless it show a want of jurisdiction in the Court. (*o*)

(*o*) 7 Geo. IV. c. 64, s. 21. So much of the 7 Geo. IV. c. 64, s. 21 as provides that no judgment shall be arrested for want of a *similiter* is omitted, as it is proposed that a *similiter* on the record should no longer be necessary. See Chapter V., Section 2, Article 104. The latter branch of this Article is not contained in the statute. The statute contains further provision for supporting an indictment founded on a statute, when the offence is described in the terms of the statute; this, however, is included in the last preceding Article.

ART. 9.

No judgment shall be arrested by reason of any defect apparent on the record, if it show a crime sufficiently charged by competent authority, that the party charged was duly called upon to make his defence, and that he has either omitted to make any defence to such charge, or that such defence has been duly decided to be insufficient by the judgment of the Court in point of law, so far as the defence depended on matter of law, and by a jury lawfully empanelled, so far as such defence depended on matter of fact; and provided it do not appear from the record tnat the accused has been excluded from taking any just exception, or from insisting on any benefit or privilege allowed by the law, and material to his defence. (*p*)

(*p*) Qy. as to the adding this Article, or substituting it for the two preceding Articles.

ART. 10.

Judgment may also be arrested where the offender becomes insane after his conviction, provided the fact be found by means of an *ex-officio* inquiry by a jury, or otherwise sufficiently appear. (*q*)

(*q*) 1 Hale's P. C., p. 35; 4 Black. Com., p. 24; and see 39 and 40 Geo. III., c. 94, s. 2, which, however, only applies where a person appears to be insane on his arraignment; and see 1 Chitty's C. L., p. 762.

ART. 11.

Non-identity.

Where the offender having been out of custody since his conviction, or being brought up for judgment in the Court of Queen's Bench, having been convicted at any sittings or assizes upon a record of that Court, or in some other Court from which the proceedings have been removed into the Court of Queen's Bench by virtue of a writ of *certiorari*, denies that he is the person convicted, a jury shall be immediately or afterwards, as the Court shall direct, empanelled to try whether he be the same person who has been convicted; (*r*) provided that no time shall be allowed him to procure any witnesses, or for any other purpose, unless he will positively swear that he is not the person who has been convicted; or unless strong grounds shall be shown for presuming that there has been a

mistake as to his identity; (*s*) and provided also that he shall not be allowed any peremptory challenges of the jury, (*t*) but he shall be allowed to have counsel to assist him. (*u*) Chap. VIII. Sec. 3.

(*r*) 1 Sid. 72; 4 Black. Com. 396.
(*s*) Fost. 42; 4 Black. Rep. 4, 5; 4 Black. Comm. 396; 1 Chitty's C. L. 777.
(*t*) 1 Lev. 61; Fost. 42; 1 Black. Rep. 6; 4 Black. Comm. 396; 1 Chitty's C. L. 777.
(*u*) 1 Chitty's C. L. 777, and cases there cited.

ART. 12.

A motion may be made to arrest judgment after a rule has been made absolute for entering a verdict for the Crown. (*x*)

(*x*) R. *v.* Inhab. of Barton, 4 Jur. 431.

ART. 13.

If the judgment shall be arrested, the indictment or information upon which the accused shall have been convicted, and all the proceedings thereupon shall, as regards the accused, be set aside; and judgment of acquittal shall be pronounced by the Court in his favour, (*y*) (which judgment shall be entered on record by the proper officer of the Court). (*z*) Provided, nevertheless, that such acquittal shall be no bar to any other prosecution for the offence of which he is so acquitted. (*a*) Effect of arresting judgment.

(*y*) 4 Black. Com. 375; Chitty's Burn's Jus., tit. "Judgment."
(*z*) 1 Chitty's Crim L. 720; Step. C. L. 330.
(*a*) 4 Rep. 45; 4 Black. Com. 375.

ART. 14.

It shall be lawful for the Court to arrest judgment for any sufficient cause, although such cause shall not have been alleged by the party accused. (*b*) Court may arrest judgment, although no cause alleged.

(*b*) 1 East, 146; Steph. C. 322.

SECTION 4. Chap. VIII. Sec. 4.

Reserving questions of Law.

ART. 1.

WHEN any person shall have been convicted of any crime before any Court of oyer and terminer or gaol delivery, or Court of Quarter Sessions, the Judge or Commissioner, Recorder or Justices of the Peace, before whom the case shall have been tried, may, in his or their discretion, reserve any question of law which shall have arisen on the trial for the consideration of the justices of either bench and barons of the Exchequer, and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment until such question shall have been considered and decided, as he or they may think fit; and in either case the Court in its discretion shall commit the person convicted to prison, or shall take a recognizance of bail, with one or two sufficient sureties, and in such sum as the Court shall think fit, conditioned to appear at such time or times as the Court shall direct, and receive judgment, or to render himself in execution, as the case may be. (*a*) Questions of law may be reserved at sessions of the peace for consideration of judges.

(*a*) 11 and 12 Vic. c. 78, s. 1.

ART. 2.

The Judge or Commissioner or Court of Quarter Sessions shall thereupon state, in a case signed in the manner now usual, the question or questions of law which shall have been so reserved with the special circumstances upon which the same shall have arisen; and such case shall be transmitted to the justices of either bench and barons of the Exchequer; and such justices and barons shall thereupon have full power and authority to hear and finally determine such question or questions, and thereupon to reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of such justices and barons the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other sessions of oyer and terminer, or gaol delivery, or other sessions of the peace, if no judgment shall have been before that time given, as they shall be advised, or to make such other order as justice may require; and Questions reserved to be certified to the judges.

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such judgment and order, if any, of such justices and barons, shall be certified under the hand of the presiding chief justice or chief baron to the clerk of assize or his deputy, or to the clerk of the peace or his deputy, as the case may be, who shall enter the same on the original record in proper form; and a certificate of such entry, under the hand of the clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, in the form (V) as near as may be or to the effect thereof, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him to the sheriff or gaoler in whose custody the person convicted shall be; and such certificate shall be a sufficient warrant to such sheriff or gaoler, and all other persons, for the execution of the judgment, as the same shall be so certified to have been affirmed or amended, and execution shall be thereupon executed on such judgment, and for the discharge of the person convicted from further imprisonment, if the judgment shall be reversed, avoided, or arrested, and in that case such sheriff or gaoler shall forthwith discharge him, and also the next Court of oyer and terminer and gaol delivery or sessions of the peace shall vacate the recognizance of bail, if any; and if the Court of oyer and terminer and gaol delivery or Court of Quarter Session shall be directed to give judgment, such Court shall proceed to give judgment at the next session. (*b*)

(*b*) 11 and 12 Vic. c. 78, s. 2.

ART. 3.

Quorum of judges; their judgments to be delivered in open Court.

The jurisdiction and authorities by this Section given to the justices of either bench and barons of the Exchequer, shall and may be exercised by such justices and barons, or five of them at the least, of whom the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer, or one of such chiefs at least, shall be part, being met in the Exchequer chamber or other convenient place; and the judgment or judgments of such justices and barons shall be delivered in open Court, after hearing counsel or the parties, in case the prosecutor or the person convicted shall think it fit that the case shall be argued, in like manner as the judgments of the superior Courts of Common Law at Westminster are now delivered. (*c*)

(*c*) 11 and 12 Vic. c. 78, s. 3, in part.

ART. 4.

Case or certificate may be sent back for amendment.

The justices of either bench and barons of the Exchequer, when a case has been reserved for their opinion, shall have power, if they think fit, to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended. (*d*)

(*d*) 11 and 12 Vic. c. 78, s. 4.

ART. 5.

On a question of law reserved under the provisions of Article 1 of this Section, the prisoner's counsel shall not be allowed to argue before the justices and barons objections apparent on the face of the indictment, and which are the proper subject of a writ of error. (*e*)

(*e*) See R. *v.* Overton, 1 C. and M. 655.

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CHAPTER IX.

OF JUDGMENT AND REVERSAL OF JUDGMENT, AND PREVENTION OR SUSPENSION OF EXECUTION.

SECTION 1.

Judgment.

ART. 1.

Where judgment final, to be entered on record.

UPON the conviction of an offender, where the judgment is final, judgment is to be entered on record by the proper officer of the Court, according to the course of the Court, and sentence is to be pronounced by the Court in which the prosecution is pending, according to the provisions of the Act of Crimes and Punishments; and is to be entered on record by the proper officer of the Court. (*a*)

(*a*) 2 Hale's P. C. 401; 2 M. and Sel. 71.

ART. 2.

Court may adjourn before passing sentence.

Provided that it shall be competent to the Court, for the purpose of deliberation or otherwise, to suspend or delay the judgment and sentence until some future day on which such Court shall be duly held.

ART. 3.

Judgment at the sittings or assizes upon trials on records of Queen's Bench.

Provided also that upon all trials for felonies or misdemeanors upon any record of the Court of Queen's Bench, judgment may be pronounced during the sittings or assizes by the judge before whom the verdict shall be taken, as well upon any person who shall have suffered judgment by default or confession, upon the same record, as upon those who shall be tried and convicted, whether such persons be present or not in Court, excepting only where the prosecution shall be by information filed by leave of the Court of Queen's Bench, or such cases of informations filed by Her Majesty's Attorney-General, wherein the Attorney-General shall pray that the judgment may be postponed; and the judgment so pronounced shall be indorsed upon the record of *Nisi Prius*, and afterwards entered upon the record in Court, and shall be of the same force and effect as a judgment of the Court of Queen's Bench, unless such Court shall, within six days after the commencement of the ensuing term, grant a rule to show cause why a new trial should not be had or the judgment amended; and it shall be lawful for the judge before whom the trial shall be had, either to issue an immediate order or warrant for committing the defendant in execution, or to respite the execution of the judgment upon such terms as he shall think fit, until the sixth day of the ensuing term; and in case imprisonment shall be part of the sentence, to order the period of imprisonment to commence on the day on which the party shall be actually taken to and confined in prison. (*b*)

(*b*) 11 Geo. IV. and 1 W. IV. c. 70, s. 9.

ART. 4.

Affidavits in mitigation.

Affidavits are, at the discretion of the Court of Queen's Bench, receivable in mitigation where sentence is passed at the sittings or assizes, under the provisions of the last preceding Article. (*c*)

(*c*) R. *v.* Cox, 4 C. and P. 538.

ART. 5.

Amendment of judgment pronounced at assizes.

After sentence passed at the sittings or assizes, under the provisions of Article 3 of this Section, the judgment cannot be amended in the Court of Queen's Bench as in that Article mentioned, without showing some specific defect in the sentence, or some matter which could not have been adduced at the sittings or assizes. (*d*)

(*d*) B. *v.* Lloyd, 4 B. and Ad. 135.

ART. 6.

Judgment in capital cases.

Where an offender shall be convicted of any offence punishable with death, such offender shall, before sentence is pronounced against him, be asked if he hath or knoweth anything to say why judgment of death should not be pronounced against him; and in case such offender shall not allege any matter or thing sufficient in law to arrest or bar such judgment, the Court shall thereupon (the offender being then present in Court) (*e*) pronounce judgment of death against such offender. (*f*)

(*e*) Hawk. P. C. b. 2, c. 48, s. 17.

(*f*) The practice in the Queen's Bench appears now to be the same as in other cases, since the abolition of the four days' rule for judgment. See Rule 21 of the New Rules, pursuant to the stat. 6 Vict. c. 20.

ART. 7.

Judgment of death may be entered of record, except in cases of treason.

Provided that whensoever any person shall be convicted of any offence punishable with death (except treason), (*g*) and the Court before which such offender shall be convicted shall be of opinion that, under the particular circumstances of the case, such offender is a fit and proper subject to be recommended for the Royal mercy, it shall and may be lawful for such Court, if it shall think fit so to do, to direct the proper officer, then being present in Court, to inquire and ask, whereupon such officer shall inquire and ask if such offender hath or knoweth anything to say why judgment of death should not be recorded against such offender; and in case such offender shall not allege any matter or thing sufficient in law to arrest or bar such judgment, the Court shall and may abstain

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from pronouncing judgment of death upon such offender, and, instead of pronouncing such judgment, order the same to be entered of record; and thereupon such proper officer shall and may enter judgment of death on record against such offender in the usual and accustomed form, and in such and the same manner as if judgment of death had actually been pronounced in open Court against such offender by the Court before which such offender shall have been convicted; (*h*) and a record of every such judgment so entered shall have the like effect to all intents and purposes, and be followed by all the same consequences as if such judgment had actually been pronounced in open Court, and the offender had been reprieved by the Court. (*i*)

(*g*) By the statute, murder as well as treason was excepted; but in R. *v.* Hogg, 2 M. and Ro. 381, it was held that sentence of death may be recorded against a person convicted of murder, since the passing of the 6 and 7 Wm. IV. c. 30, s. 2, which enacted "that sentence of death may be pronounced after convictions for murder in the same manner, and the judge shall have the same power in all respects as after convictions for other capital offences."

(*h*) 4 Geo. IV. c. 48, s. 1.

(*i*) 4 Geo. IV. c. 48, s. 2. The above Article is in the terms of the Act, with the exception of the omission of some merely superfluous words.

ART. 8.

Judgment in case of non-capital felonies.

Where an offender shall be convicted of any felony not punishable with death, sentence shall not be pronounced against him (except in the case mentioned in Article 3 of this Section) unless he be present in Court at the time, and do not allege some matter or thing sufficient in law to arrest or bar judgment. (*k*)

(*k*) Com. Dig. tit. "Indictment (N)"; Hawk. P. C. b. 2, c. 48, s. 17.

ART. 9.

Judgment in cases of misdemeanor.

Where an offender shall be convicted of any misdemeanor, punishable otherwise than by a simple fine, sentence shall not be pronounced against him (except in the case mentioned in Article 3, or where his appearance shall be dispensed with under the provisions of Article 10 of this Section) unless he be present in Court at the time, and do not allege some matter or thing sufficient in law to arrest or bar judgment. (*l*)

(*l*) Hawk. P. C. b. 2, c. 48, s. 17; 1 Chitty's C. L. 695; Chitty's Burn's Just. tit. "Judgment." Dickinson's quarter sessions by Talfourd, 600; R. *v.* Templeman, Salk. 400.

ART. 10.

Presence of offender may be dispensed with by Queen's Bench in cases of misdemeanor.

It is in the discretion of the Court of Queen's Bench to dispense with the personal appearance of the offender, to receive sentence for a misdemeanor. (*m*)

(*m*) Such dispensation is usually granted on an affidavit stating grounds, such as personal inconvenience and expense, and on an undertaking by the offender's attorney to pay any fine that may be imposed, Corner's P. 154; 3 Salk. 33; Chitty's Burn's Just. tit. "Judgment," p. 489; 3 Burr. 1786–7.

ART. 11.

If the offender be in custody, he is to be brought up to receive sentence, in those cases where his presence in Court is essential, by rule or order of the Court, or by writ of *habeas corpus* if he be in the custody of some other Court. (*n*)

(*n*) Corner's P. 154.

ART 12.

Custody of offender during adjournment of Court.

If upon the conviction of any offender the Court before whom he shall have been convicted shall think proper to adjourn before pronouncing judgment against him, such offender, if he shall be in custody at the time of his conviction, shall continue in custody during the interval of such adjournment, and until judgment shall be pronounced against him, unless in the case of a conviction for any misdemeanor or felony not punishable with death, the Court shall think fit, with the consent of the prosecutor, to allow the offender to be liberated upon his entering into his recognizance with one or two sufficient sureties in such sum as such Court shall think proper, with condition to appear on the day to which such Court shall adjourn, or when called upon to receive judgment; and if at the time of his conviction he shall be out of custody upon his recognizance to appear and answer the offence of which he shall have been so convicted, then he may, with the consent of the prosecutor, if the Court shall think proper, enter into a new recognizance with one or two sufficient sureties, in such sum and with such condition as are hereinbefore in this Article mentioned; and such former recognizance shall be thereby discharged. (*o*)

(*o*) Talf. Dick. Sess. 591; R. *v.* Waddington, 1 East, 159; R. *v.* Wilkes, 4 Burr. 2539; Chitty's Burn's Just. title "Judgment;" Step. Crim. Law, 320.

ART. 13.

Provided that where a prisoner shall have been so confined in custody as in the last preceding Article is mentioned, or shall have been imprisoned under any warrant or process previously to his trial for any offence of which he shall have been convicted, it shall, although the minimum of the term of imprisonment to which he shall be liable on conviction be limited, be lawful for the Court or Judge in passing sentence, at their or his discretion, to adjudge such offender to a term less than such appointed minimum by any term not exceeding the aggregate of the term of imprisonment already suffered.

ART. 14.

Affidavits in aggravation or mitigation.

Where an offender shall be convicted of any misdemeanor in the Court of Queen's Bench, or at any sittings or assizes upon any record of that Court, it shall be lawful for the prosecutor, at the time of moving for judgment against such offender, to produce and have read an affidavit or affidavits in aggravation of such misdemeanor, and for the offender to produce and have read an affidavit or affidavits in mitigation thereof.

ART. 15.

Such affidavit or affidavits may state facts which occurred either before or subsequently to the trial, although they show distinct offences; but no greater punishment is to be inflicted than is warranted by the original charge. (*p*)

(*p*) R. *v.* Withers, 3 T. R. 428.

ART. 16.

Course of proceeding on bringing up for judgment in Queen's Bench.

Where a defendant is brought up for judgment in the Court of Queen's Bench after verdict, although it be by consent, the defendant's affidavits are first read, then those of the prosecution; after which the counsel for the defendant is heard, and then the counsel for the prosecution. (*q*)

(*q*) R. *v.* Bunts, 2 T. R. 683; R. *v.* Dignam, 7 A. and E. 593.

ART. 17.

Where the defendant is brought up in the Court of Queen's Bench, after judgment on demurrer or by default, or after having pleaded "guilty," the prosecutor's affidavits are first read, then the defendant's; after which the prosecutor's counsel are heard, and then the counsel for the defendant. (*r*)

(*r*) R. *v.* Bunts, 2 T. R. 683; R. *v.* Dignam, 7 A. and E. 593.

ART. 18.

Where several defendants are brought up in the Court of Queen's Bench, some after judgment by default and others after verdict, the course as to all is the same as in Article 16 of this Section. (*s*)

(*s*) R. *v.* Despard, 2 M. and R. 406; R. *v.* Dignam, 7 A. and E. 593. See R. *v.* Sutton, 7 A. and E. 592.

ART. 19.

If no affidavits are produced when the defendant is brought up as in Article 17 of this Section is mentioned, the counsel for the defendant are first heard, and then the counsel for the prosecution. (*t*)

(*t*) R. *v.* Bunts, 2 T. R. 683; Corner's P. 153.

ART. 20.

Affidavits in aggravation not admissible in felony.

Affidavits in aggravation are not admissible on a charge of felony, although the indictment has been removed into the Court of Queen's Bench by writ of *certiorari*. (*u*)

(*u*) R. *v.* Ellis, 9 D. and R. 174.

ART. 21.

Joint fine.

Where several offenders are jointly convicted of any offence, the Court may, in its discretion, impose a joint fine on such offenders. (*v*)

(*v*) 6 Harg. St. Tr. 833; 11 Ib. 294; 1 Chitty's C. L. 700. This was done by Mr. Justice Holroyd, in the case of a conviction for publishing a libel at York, and he said that the propriety of such a sentence in the case of a fine had been the subject of consideration by himself and his brother judge; but see *contra*, Hawk. P. C. b. 2, c. 48, s. 18; Chitty's Burn's Just. tit. "Judgment."

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ART. 22.

Several judgments.

Where several persons shall be indicted for an aggravated offence which includes any more simple offence, and one or more of such persons shall be convicted of the former, and another or others of them of the latter offence, as in Article 9 of Section 11 of Chapter VII. of this Act is mentioned, judgment may be severally given according to their different offences. (*w*)

(*w*) R. *v.* Butterworth and others, 1 Russ. and Ry. C. C. 520; Chitty's Burn's Just. tit. "Judgment." It should be observed that in R. *v.* Butterworth, the judgment for both offences was by law the same; but that in R. *v.* Hempstead (Russ. and Ryan, 344), where the judgment for the two offences would have been distinct, it was held that judgment could not be given in respect of both, but that on entering a *nolle prosequi* as to the party convicted of the more simple offence, judgment might be given against the other. We recommend, however, that whether the judgment would be the same as to the two offences or not, judgment should be given in respect of both offences, where any person is convicted of the one and any other person of the other.

ART. 23.

Accessory before the fact, judgment on, where charged together, with principal.

No penal judgment shall be given against any party indicted as an accessory together with the principal, before judgment shall have been given against such principal. (*x*)

(*x*) This Article corresponds with the present law in the case of accessories indicted together with the principal for felony, and must now, therefore, be extended to all offences, since it is proposed by the Act of Crimes and Punishments to make no distinction between felonies and other offences as regards the parties to a crime; but this as well as some other provisions would be unnecessary if the accessory were in all cases to be charged simply in the same manner as a principal is charged.

Since, henceforth, if our recommendations be adopted, crimes which by the present law are felonies, will no longer be laid in the indictment as such, but the language of the Article by which they are defined will simply be followed, the following Article in the Act of Procedure is unnecessary, and we have therefore omitted it:—

"ART. 24.

Judgment cannot be given, upon a general verdict, if the facts show an offence of a lesser degree than the one charged.

"If upon an indictment for a crime laid as felony, the accused be found guilty generally, but in the "opinion of the Court the facts averred show that which amounts to a misdemeanor only, judgment "cannot be given as for a misdemeanor. (*)

(*) "Westbeer's Case, Str. 1133—the contrary is erroneously stated, Hawk. P. C. b. 2, c. 47, s. 6. "See also R. *v.* Turner, 1 R. and M. C. C. 397."

ART. 24.

Where some only of the charges in an indictment are good, judgment may be given in respect of those.

If it shall appear that one or more of the charges in any indictment is or are sufficient in law, then, although one other charge or several other charges in the same indictment shall be deemed to be insufficient, the party accused shall be acquitted in respect of such charge or charges only as shall be so held to be insufficient, and judgment shall be given in respect of such charges as are sufficient. (*y*)

(*y*) Salk. 384; Doug. 738; Hawk. P. C. b. 2, c. 47, s. 9.

ART. 25.

Judgment on special verdict.

The Court, in judging on a special verdict, is confined to the facts expressly found, and cannot supply the want thereof as to any material part, by any argument or implication from what is expressly found. (*z*)

(*z*) Hawk. P. C. b. 2, c. 47, s. 9, and the cases there cited, Leach's Ed.

ART. 26.

Judgment on offender already imprisoned under sentence for another crime.

Whensoever sentence shall be passed for any offence, (*a*) on a person already imprisoned under sentence for another crime, it shall be lawful for the Court to award imprisonment for such subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced; and where such person shall be already under sentence, either of imprisonment or of transportation, the Court, if empowered to pass sentence of transportation, may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or transportation to which such person shall have been previously sentenced. (*b*)

(*a*) The words of the Act are "for felony." But this seems to have been the law as to misdemeanors before the passing of the 7 and 8 Geo. IV. c. 28, (see R. *v.* Wilkes, 4 Burr. 2577,) Chitty's Burn's Just. tit. "Judgment;" we have, therefore, altered the language of the Act to include misdemeanors.

(*b*) 7 and 8 Geo. IV. c. 28, s. 10. The Act continues, "although the aggregate term of imprisonment or transportation respectively may exceed the term for which either of those punishments could be otherwise awarded;" but these words appear to be superfluous.

ART. 27.

Judgment where party convicted of

Where, in those cases in which it is permitted by this Act, a person shall be convicted of several offences at the same time, it shall be lawful for the Court to

sentence him to the several penalties prescribed by the Act of Crimes and Punishments in respect of the several offences of which he shall have been so convicted, such penalties, when consisting of imprisonment or transportation, to commence the one after the expiration of the other. (*c*)

several offences at the same time.

(*c*) R. *v.* Williams, 1 Leach, 536; 1 Leach, 451; 1 Chitty's C. L. 718.

ART. 28.

A person on whom sentence of death has been actually passed, shall not, whilst under that sentence, be brought up to receive judgment for another offence, although he may have been under such sentence at the time of his trial for such offence. (*d*)

Party already under sentence of death cannot be brought up for judgment for another offence.

(*d*) R. *v.* Brady, Russ. and Ry. 268. But the prior attainder is not pleadable. See 7 and 8 Geo. IV. c. 28, s. 4.

ART. 29.

Where the extent or amount of any penalty or penalties which the Court may award is discretionary, the judgment pronounced by the Court is not to be excessive. (*e*)

Discretionary penalties not to be excessive.

(*e*) 9 Hen. III. c. 13; 11 Harg. St. Tr. 136; 1 W. and M. sess. 2, c. 2, s. 11; R. *v.* Ellis, 8 D. and R. 173; S. C. 5 B. and C. 395.

ART. 30.

No judgment pronounced against an offender shall be lawful which shall omit any essential part of the sentence required by the particular Article of the Act of Crimes and Punishments under which such offender shall have been convicted. (*f*)

Judgment must not omit any essential part of sentence.

(*f*) R. *v.* Walcot, 4 Mod. 395; 2 Salk. 632, S. C.; R. *v.* Fletcher, Russ. and Ry. C. C. 58; Chitty's Burn's Just. tit. "Judgment."

ART. 31.

The time and place of execution of a capital offender are no part of the sentence. (*g*)

Time and place of execution no part of sentence.

(*g*) R. *v.* Doyle, 1 Leach, C. C. 67; Atkinson *v.* Rex in error, 3 Bro. P. C. 517.

ART. 32.

It shall be lawful for the Court at any time, and from time to time during the term, sittings, assizes, or session of the peace, as the case may be, in which such Court shall have pronounced judgment against any offender, where the extent or amount of any penalty or penalties which the Court may award is discretionary, to vary the extent or amount of the penalty or penalties to which it shall have sentenced such offender. (*h*)

Alteration of sentence.

(*h*) 1 Inst. 260; Cro. Car. 251; Hawk. P. C. b. 2, c. 48, s. 20; 1 Chitty's C. L. p. 722; Chitty's Burn's Just. tit. "Judgment." Justices at sessions may alter their judgment during the session, because it is regarded as only one day; but they cannot do it at any subsequent period, unless an adjournment be entered on the roll (2 Salk. 606; S. C. 6 Mod. 287; Chitty's Burn's Just. tit. "Judgment)." We have not thought it necessary to insert any special Article as to this, since every adjournment is a continuation of the same session. Talfourd's Dick. Qr. Sess. 5th ed. p. 61.

ART. 33.

Where the amount of a fixed fine has been miscalculated in the verdict and judgment, the Court may, upon motion, alter the rule for judgment and the entry roll as to so much of the punishment, but will not alter the judgment and verdict. (*i*)

(*i*) R. *v.* Stevens, 3 Smith, 366.

ART. 34.

Provided that no such alteration can be made after the judgment has once been formally entered on the record. (*j*)

(*j*) 4 Mod. 395; 1 Chitty's C. L. p. 722; Chitty's Burn's Just. tit. "Judgment."

ART. 35.

Upon conviction of a nuisance, which is alleged in the indictment to be a continuing nuisance, judgment is to be given for the abatement of such nuisance. (*k*)

Judgment upon convictions for nuisances.

(*k*) R. *v.* Stead, 8 T. R. 142; R. *v.* W. R. Yorkshire, Js. 7 T. R. 467.

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ART. 36.

It is at the discretion of the Court to omit such judgment if it be satisfied that the nuisance has already been abated. (*l*)

(*l*) R. *v.* Incledon, 13 East, 164.

ART. 37.

It is also in the discretion of the Court to direct the writ *de nocumento amovendo* to be suspended to give the party convicted opportunity for removing or abating the nuisance himself. (*m*)

(*m*) R. *v.* Wright, Easter, 1838; R. *v.* Bell, Michaelmas, 1823; Corner's P. 154.

ART. 38.

Nuisances by steam-engines.

If it shall appear to the Court by which judgment ought to be pronounced in case of conviction on any indictment for a nuisance from the improper construction or negligent use of furnaces employed in the working of engines by steam, that the grievance may be remedied by altering the construction of the furnace so employed in the working of engines by steam, it shall be lawful to the Court, without the consent of the prosecutor, to make such order touching the premises as shall be by such Court thought expedient for preventing the nuisance in future, before passing final sentence upon the defendant or defendants so convicted. (*n*)

(*n*) 1 and 2 Geo. IV. c. 41, s. 2.

ART. 39.

Provided that the provisions of the last preceding Article shall not extend to the owners or proprietors, or occupiers of any furnaces of steam-engines erected solely for the purpose of working mines of different descriptions, or employed solely in the smelting of ores and minerals, or in the manufacturing of the produce of such ores or minerals, on or immediately adjoining the premises where they are raised. (*o*)

(*o*) 1 and 2 Geo. IV. c. 41, s. 3.

ART. 40.

Judgment of acquittal.

Upon the acquittal by verdict of any person charged with any offence, the judgment of acquittal is, that he depart the Court without day in that behalf; and such judgment is to be entered on record by the proper officer of the Court in which the prosecution was pending at the time of such acquittal; and the recognizances are to be discharged. (*p*)

(*p*) See Corner's Forms, p. 108.

Chap. IX. Sec. 2.

SECTION 2.

Reversal of Judgment by Writ of Error, &c.

ART. 1.

A JUDGMENT pronounced against an offender after conviction may be falsified or reversed either by plea without writ of error or by writ of error: by plea without writ of error, where the ground of falsifying or reversing the judgment is some matter not apparent upon the face of the record; (*a*) by writ of error, where it is some matter apparent upon the face of the record. (*b*)

(*a*) Hawk. P. C. b. 2, c. 50, s. 1; 4 Black. Comm. 390–1; 1 Chitty's C. L. 743–4. It appears to be doubtful whether there are not a few instances where judgment may be avoided for a mistake apparent on the record, without a writ of error. Lord Coke seems to be of opinion that this may be done in certain cases *in favorem vitæ* (Co. Lit. 259 b.); but this opinion is not warranted by any recent practice. See 1 Chitty's C. L., p. 743–4, and the cases there cited.

(*b*) 4 Black. Com. 391; 1 Chitty's C. L. 741, 747.

ART. 2.

Grounds for falsifying or reversing a judgment by plea without writ of error.

As ground for falsifying or reversing the judgment for matter not apparent upon the face of the record,—

1st. The defendant may show want of authority in the Court, person, or persons by whom it was pronounced.

2ndly. A purchaser from a party afterwards attainted may falsify the indictment either by denying the fact of the offence itself, or by averring it to have been

committed after the time alleged in the indictment and after his purchase: provided that where the sentence upon such offender shall be consequent on a verdict of guilty, it shall not be lawful for such third person to falsify the fact of the offence, but only the time when it was committed. (*c*)

(*c*) 3 Inst. 230; Plowd. 390; Bulst. 101; 1 Hale's P. C. 361; Hawk. P. C. b. 2, c. 50, ss. 2 and 3; 4 Black. Com. 391; 1 Chitty's C. L. 744, 6, 7.

ART. 3.

Reversal of judgment of outlawry.

On a judgment in outlawry for treason or felony, the outlawry may be reversed without writ of error, by plea that the defendant was in prison or in the service of the Queen beyond the seas, at the time of the outlawry pronounced against him, or by plea of any other matter of fact not apparent upon the face of the record which makes the outlawry erroneous. (*d*)

(*d*) This is in *favorem vitæ*, *per* Ld. Coke, 259 b.; Hawk. P. C. b. 2, c. 50, s. 6.

ART. 4.

But no outlawry for any misdemeanor against a party rightly described can be reversed by plea, without writ of error, for any matter of fact not apparent upon the face of the record.

ART. 5.

An outlawry for any offence may be avoided by the defendant's coming in upon the *capias utlagatum* and pleading a misnomer, as by showing that he has always been known by a different name of baptism or surname from that by which he is called in the writ, or that he has some other addition, and not that specified in the writ; (*e*) or by pleading that there is no such town as that whereof he is named; (*f*) or that at the time of the writ purchased and ever since, he has made his abode at some other town, and not at that specified in the writ; (*g*) or that there are two persons of the same name and addition, and that the person intended is the elder, and that he is the younger. (*h*)

(*e*) Hawk. P. C. b. 2, c. 50, s. 10.
(*f*) This, however, has been doubted, Hawk. P. C. b. 2, c. 50, s. 10.
(*g*) Hawk. P. C. b. 2, c. 50, s. 10.
(*h*) This is doubted, Hawk. P. C. b. 2, c. 50, s. 10; and it is said that he may in such case sue out his writ *de idemptitate nominis*: it appears to us, however, that the more simple and advisable course would be to allow the plea, and so to dispense with resorting to the latter writ.

ART. 6.

By such plea as in the last preceding Article is mentioned, the outlawry shall be avoided only as to the person who pleads it, (*i*) and shall stand in force against the person of the name and addition mentioned in the record. (*j*)

(*i*) For it is to be presumed, it seems, that he was not the person meant.
(*j*) Hawk. P. C. b. 2, c. 50, s. 10.

ART. 7.

In what cases judgment may be falsified or reversed by writ of error.

The matters apparent upon the face of the record, which are sufficient to falsify or reverse a judgment within the meaning of Article 1, are—

The same as are sufficient to arrest or bar a judgment, (*k*) and also any material defect in the judgment itself. (*l*)

(*k*) 1 Chitty's C. L. 752; 7 Geo. IV. c. 64, ss. 20 and 21.
(*l*) 1 Ld. Raym. 48, 267; 1 Chitty's C. L. 752.

ART. 8.

Judgment, when defective.

Where an entire judgment or sentence is pronounced in respect of several distinct offences alleged in several counts of an indictment, some of which counts are good, and one or more of them is or are bad in law, such judgment or sentence is defective. (*m*)

(*m*) O'Connell *v.* The Queen. Dom. Proc. 1844.

ART. 9.

A judgment is also materially defective which sentences a party to suffer any punishment not warranted by law. (*n*)

(*n*) R. *v.* Howell, R. and Ry. C. C. 253.

ART. 10.

On error brought in the Queen's Bench upon a judgment in another Court, no fact can be assigned for error which contradicts the record. (*o*)

(*o*) R. *v.* Carlisle, 2 B. and Ad. 362; 4 C. and P. 415.

ART. 11.

Reversal of judgment of outlawry.

A judgment of outlawry may be reversed by plea without a writ of error for any matter apparent upon the face of the record which makes the outlawry erroneous. (*p*)

(*p*) This has been doubted, Hawk. P. C. b. 2, c. 50, s. 1; but it is so laid down by Ld. Coke, although with some hesitation, whether the defendant in another term would not be driven to his writ of error.

ART. 12.

In what Courts writs of error to be brought.

A judgment may be falsified or reversed by writ of error in the Court of Queen's Bench, where such judgment has been pronounced by the Court of a county palatine, of any session of oyer and terminer, general gaol delivery, or of the peace, or by any other Court of inferior jurisdiction; in the Exchequer Chamber, before the Justices of the Common Pleas and Barons of the Exchequer, under the provisions of an Act passed in the Session of Parliament holden in the 11th year of the reign of King George the Fourth and the 1st year of King William the Fourth, intituled "An Act for the more effectual administration of Justice in England and Wales," where it has been pronounced by the Court of Queen's Bench; and in the House of Lords, where it has been pronounced upon error, in the Exchequer Chamber before the justices and barons. (*q*)

(*q*) Hawk. P. C. b. 2, c. 50, s. 17; 4 Black. Comm. 391; 1 Chitty's C. L. 747; 11 Geo. IV. and 1 Wm. IV. c. 70.

ART. 13.

Provided that the Act in the last preceding Article mentioned shall not be deemed to extend to any error in fact or in process. (*r*)

(*r*) Gurney *v.* Gordon, 2 Cr. and J. 11; Corner's P. 106.

ART. 14.

In order to the falsification or reversal of a judgment by plea or by writ of error in the Court of Queen's Bench, upon an indictment not found in that Court, the indictment and other proceedings thereon must be first removed into that Court by writ of *certiorari*; or, in the case of a writ of error, such last-mentioned writ may be first sued out, and the indictment and other proceedings thereon be removed by its authority. (*s*)

(*s*) 1 Chitty's C. L. 749.

ART. 15.

Judgments of inferior Courts reversable only by writ of error.

After judgment pronounced in an inferior Court, it cannot be reversed except by writ of error. (*t*)

(*t*) R. *v.* Seton, 7 T. R. 373; R. *v.* Justices of W. R. of Yorkshire, 7 T. R. 467.

ART. 16.

Who only may plead matter showing that judgment ought to be reversed.

No other person than the party against whom judgment has been pronounced, or a purchaser from such party in the case and manner mentioned in Article 2 of this Section, shall be entitled to plead any matter showing that such judgment ought to be falsified or reversed.

ART. 17.

Who only may bring writs of error.

A writ of error may be sued out either by the party himself against whom judgment has been pronounced, or, in capital cases, by his heir, executors or executor, but by no other person, whatsoever interest he may claim in the falsification or reversal of such judgment. (*u*)

(*u*) 5 Co. 111*a*; Cro. Eliz. 225, 558; 1 Leon. 325; 1 Salk. 295; Co. Lit. 13, note (1); Hawk. P. C. b. 2, c. 50, s. 11; 4 Black. Comm. 392; 1 Chitty's C. L. 747

ART. 18.

How issued.

A writ of error issues only upon leave for that purpose first obtained under the royal sign manual, or the fiat of the Attorney-General. (*x*)

(*x*) 1 Vern. 170, 175; 4 Black. Comm. 392; 1 Chitty's C. L. 747-9.

ART. 19.

In case of treason or felony, it is in the absolute discretion of the Crown to grant or refuse such writ. (*y*)

(*y*) 4 Burr. 2551; 1 Sid. 69; 1 Bulst. 71; 3 Mod. 42; 1 Vern. 170, 5; 1 Burr. 641; Rep. T. H. 251; Hawk. P. C. b. 2, c. 50, s. 11; 4 Black. Comm. 392; 2 Saund. 101 *a*. n. 1; 2 Salk. 504; 1 Chitty's C. L. 748.

ART. 20.

In all other cases, upon probable cause of error shown, the Attorney-General ought to grant his fiat. (*z*)

(*z*) 4 Burr. 2550-1; 2 Salk. 504; 4 Black. Comm. 392. It is so laid down, 4 Burr. 2550-1. We think that the granting a fiat in such cases ought to be either unnecessary or of right.

ART. 21.

Felony—presence of party suing out writ.

On a charge of treason or felony, the party who has sued out a writ of error must appear in Court in person for the purpose of assigning error, and may, if he be in custody, procure himself to be brought up by writ of *habeas corpus* for that purpose: (*a*) so where judgment of outlawry has been pronounced against him he may, if not taken on a *capias utlagatum*, render himself into custody and be brought up by writ of *habeas corpus* to assign error. (*b*)

(*a*) Corner's P. 102. It is stated, Haw. P. C. b. 2, c. 50, s. 11, that errors must be assigned previously.

(*b*) 4 Burr. 2534.

ART. 22.

Mode of proceeding.

On a charge of treason or felony, the party being so present in Court as in the last preceding Article is mentioned, after oyer prayed of the record, is to assign error or errors, and may pray that counsel be assigned to him, and such assignment is to be made.

ART. 23.

Error must be real.

The prosecutor will not be allowed to admit error in law; it is for the Court to judge whether there be error in law: but the prosecutor may, if he will, admit error in fact. (*c*)

(*c*) 4 Burr. 2551; Corner's P. 245.

ART. 24.

Judgment by default.

A copy of the assignment of error being served on the prosecutor, and a rule being served on the Attorney-General, or the Queen's Attorney and Coroner, according to the course and practice of the Court, to join in error, in default of joinder according to the course and practice of the Court, the plaintiff in error will be entitled to judgment. (*d*)

(*d*) See Corner's Practice, 103; 1 Chit. C. L. 750.

ART. 25.

Presence of party who sues out writ of error.

The party who sues out the writ of error must be present in Court when the case is argued, and also when judgment is given.

ART. 26.

Misdemeanor.

On a charge of misdemeanor, the proceedings on a writ of error are the same as on a charge of treason or felony, with the exception, that it is not necessary that the party who sues out the writ of error should assign error in person, or be present in Court when the case is argued, or when judgment is given. (*e*)

(*e*) Corner's P. 105.

ART. 27.

Effect of issuing writ of error.

A writ of error, when issued, shall, until such writ shall be finally determined, stay the execution of the judgment sought to be reversed by it, where such judgment has not been wholly or partially carried into effect; and where it has been partially carried into effect, shall stay the further execution of it. (*f*)

(*f*) Quære—See 6 Mod. 178; 1 Chitty's C. L. 750.

ART. 28.

Provided that, notwithstanding anything in the last preceding Article contained, in case of treason or felony, the party against whom the judgment which is sought

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to be reversed has been pronounced, shall not be entitled to be liberated on bail whilst the matter of such writ is pending. (*g*)

(*g*) 4 Burr. 2539, 2545; 1 Chitty's C. L. 751.

ART. 29.

Execution on judgments for misdemeanors stayed or suspended by writ of error, and bail thereon.

In case of any misdemeanor, where a defendant shall be imprisoned under execution, upon a judgment which he shall have obtained a writ of error to reverse, or any fine shall have been levied, either in whole or in part, in pursuance of such judgment, such defendant shall be entitled to be discharged from imprisonment, and to receive back any money levied on account of such fine from any person in whose possession the same shall be, until the final determination of such writ. (*h*)

(*h*) 8 and 9 Vic. c. 68, s. 1, in part.

ART. 30.

Provided that no execution upon any judgment for a misdemeanor shall be stayed, unless and until the defendant shall become bound by recognizance, to be acknowledged before one of the Judges of the Court of Queen's Bench, or one of the Commissioners appointed to take special bail in actions depending in the superior Courts, with two sufficient sureties to be approved of by such Judge or Commissioner in such sum as such Judge or Commissioner shall direct, to prosecute the writ of error with effect, and in case the judgment shall be affirmed, forthwith to render such defendant to prison, according to such judgment, where imprisonment shall have been adjudged; and every such recognizance shall, after justification of bail, be filed of record in the Court of Queen's Bench, in like manner and upon payment of the like fees as in the case of other recognizances filed in the Crown Office in that Court; and the Judge of the Court of Queen's Bench, and such Commissioner shall have the like powers, in respect of the justifying such bail in error and the examination of the sureties, and the like rules shall apply, as in respect of special bail in actions depending in such Court: Provided that in the case of any defendant under legal disability it shall be sufficient if two persons, to be approved of by such Judge or Commissioner, shall become bound by recognizance on the behalf of such defendant to be so acknowledged and conditioned. (*i*)

(*i*) 8 and 9 Vic. c. 68, s. 1, in part.

ART. 31.

Certificate of recognizance being duly filed.

The clerk of the Crown in the Court of Queen's Bench shall for the purposes hereinafter in this Article mentioned, make out and deliver to such defendant as in Article 29 of this Section mentioned, or his lawful attorney, a certificate in writing under his hand, that such recognizance is duly filed of record in such Court, upon payment of the like fee as for other certificates delivered at the Crown Office; and such certificate, when duly verified by affidavit, to be made before one of the Judges of the superior Courts of Common Law or a Commissioner duly authorized, shall be a sufficient warrant to every gaoler or other person having custody of such defendant in execution of such judgment to discharge him out of custody, and also to every person having in his possession the whole or any part of any fine levied in execution of such judgment to authorize and require the repayment thereof to such defendant; but no person who shall have received any such money, and have paid it over to any other person, according to the course of the Exchequer, shall be liable to repay to such defendant any part of the money so paid over. (*j*)

(*j*) 8 and 9 Vic. c. 68, s. 2.

ART. 32.

Reversal of attainder of felony.

No attainder of felony against any person who had lands at the time of such attainder can be reversed by writ of error, unless a writ of *scire facias* be first issued against all the terre-tenants and lords mediate and immediate to show cause why such person should not have restitution of such lands. (*k*)

(*k*) 2 Salk. 495; Dyer, 34 *a*; Hawk. P. C. b. 2, c. 50, s. 14; 1 Chitty's C. L. p. 755. In Stafford's case, M. 12 Ann. a *scire facias* in case of treason was held to be unnecessary upon examination of all the precedents.

ART. 33.

Effect of reversal of the judgment of the Court below.

Upon the falsification or reversal of a judgment against any person who shall have been convicted of any offence, such judgment, and the execution thereupon, and all former proceedings, shall become thereby absolutely null and void, and such person shall be discharged, and shall, if living—and if dead, his heir or per-

sonal representative respectively shall—be restored to all things which such person may have lost by such judgment and proceedings, and shall stand in every respect as if such person had never been charged with the offence in respect of which such judgment was pronounced against him; but if the execution only be erroneous, that only shall be reversed. (*l*)

(*l*) Hawk. P. C. b. 2, c. 50, s. 19; 4 Black. Comm. 393; 1 Chitty's C. L. 756; and see form of reversal of judgment on writ of error given in Mr. Corner's "Forms of Writs and other proceedings on the Crown side of the Court of Queen's Bench."

ART 34.

Upon the falsification or reversal of an attainder against any person, if such person had any lands at the time of his attainder, and the same have been granted away by the Crown, he may re-enter upon them in the same manner in every respect as if he had been disseised. (*m*)

(*m*) Hawk. P. C. b. 2, c. 50, s. 20; 4 Black. Comm. p. 393; 1 Chitty's C. L. 756.

ART. 35.

Provided that where the judgment is falsified or reversed by reason of some technical error in the indictment or subsequent process, the party shall nevertheless be liable to be again prosecuted on account of the offence in respect of which the judgment is so falsified or reversed. (*n*)

(*n*) 4 Black. Comm. 393; 1 Chitty's C. L. 756.

ART. 36.

Accessory when indicted together with the principal.

By the falsification or reversal of the judgment against the principal, that against any accessory indicted together with the principal, becomes *ipso facto* null and void, and all the like consequences follow as regards such accessory as follow in the case of the principal. (*o*)

(*o*) 9 Co. 119; 1 Roll. Abrid. 777; Hawk. P. C. b. 2, c. 29, s. 40; 1 Chitty's C. L. 756. This is so at present in the case of felony; and since it is proposed by the Act of Crimes and Punishments that there shall be no distinction between felonies and other offences as regards the parties to a crime, must now be made generally applicable, so long as an accessory may be indicted as such.

ART. 37.

If judgment be reversed on writ of error, record may be remitted to Court below for judgment.

Whensoever any writ of error shall be brought upon any judgment on any indictment or information, in any criminal case, and the Court of Error shall reverse the judgment, it shall be competent for such Court of Error either to pronounce the proper judgment, or to remit the record to the Court below, in order that such Court may pronounce the proper judgment upon such indictment or information. (*p*)

(*p*) 11 and 12 Vic. c. 78, s. 5.

ART. 38.

Order for erroneous judgment in Court below, where not followed by judgment.

Where an order for an erroneous judgment has been given in the Court below, but has not been followed up by judgment, a *procedendo* will be awarded by the Court in which error is brought that the Court below may give judgment. (*q*)

(*q*) R. *v.* Kenworthy, 1 B. & C. 711; 3 D. & R. 173.

ART. 39.

Reversal of outlawry before plea.

After the reversal of a judgment in outlawry, before plea pleaded to the indictment or information, the party shall be put to plead to such indictment or information. (*r*)

(*r*) Hawk. P. C. b. 2, c. 50, s. 18; Corner's P. 245.

ART. 40.

Effect of affirmance of judgment.

On affirmance of judgment in cases of treason and felony, upon such plea as is mentioned in Article 1 of this Section, or upon writ of error, and, in case of any misdemeanor, upon such plea, the law is to take its course as though no such plea had been pleaded, or no writ of error had been brought.

ART. 41.

Time of imprisonment, how reckoned.

Where, in case of any misdemeanor, the judgment sought to be reversed shall be affirmed upon writ of error, and imprisonment shall have been adjudged, the period for its continuance in pursuance of such judgment, if such imprisonment shall not have commenced under execution upon such judgment, shall be reckoned to begin from the day when the defendant shall be in actual custody under such judgment; and if the defendant shall have been discharged from imprisonment

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under the provisions of Article 29 of this Section, such defendant shall be liable to be imprisoned for such further period as, with the time during which he may already have been imprisoned under such execution, shall be equal to the period for which such defendant was so adjudged to be imprisoned. (*s*)

(*s*) 8 & 9 Vic. c. 68, s. 3.

ART. 42.

Payment and recovery of a fine not to prevent imprisonment till fine again paid.

Where, in case of any misdemeanor, the judgment sought to be reversed shall be affirmed upon writ of error, and such judgment shall have been for payment of a fine and imprisonment until such fine be paid, either with or without imprisonment for a certain time, and the defendant shall have paid the fine, or the same or any part thereof shall have been levied, and shall have been received back, under the provisions of Article 31 of this Section, such defendant shall not be entitled, by reason of such payment, to be discharged from imprisonment, notwithstanding the expiration of any certain time of imprisonment for which the original judgment shall have been given, until the fine shall be again paid. (*t*)

(*t*) 8 & 9 Vic. c. 68, s. 4.

ART. 43.

Writ of error to be quashed in case of delay or neglect to prosecute it.

If the Court in which any writ of error shall be pending to reverse a judgment in case of any misdemeanor, shall upon motion in that behalf decide that the defendant by whom such writ shall be brought has wilfully delayed or neglected to prosecute the same with effect, it shall be lawful for such Court to order such writ to be quashed, and thereupon such defendant shall be liable to execution upon the judgment. (*u*)

(*u*) 8 & 9 Vic. c. 68, s. 5.

ART. 44.

Alteration of judgment on a writ of error.

The Court of Queen's Bench having given judgment on a writ of error confirming the judgment below, cannot, after the expiration of the term in which such judgment has been given, alter the judgment, although an amendment has in the mean time been made on the record.

Chap. IX. Sec. 3.

SECTION 3.

Prevention of Execution of Judgment by Pardon.

ART. 1.

IF any treason or felony of which a man is attainted, be afterwards pardoned by Act of Parliament, the attainder may be falsified by himself or his heirs without plea. (*a*)

(*a*) Hawk. P. C. b. 2, c. 50, s. 3.

ART. 2.

The execution of a judgment may, in all cases, be prevented by a pardon, where the offender has received one since judgment was pronounced against him; subject, however, to such and the like rules and regulations, as well as regards the force as the validity of the pardon, as apply where a pardon is pleaded upon arraignment. (*b*) Provided that no attainder of treason or felony shall be deemed to be included in any pardon, unless such attainder be therein particularly mentioned. (*c*)

(*b*) Hawk. P. C. b. 2, c. 37; 4 Black. Com. 396–402; 1 Chitty's C. L. 762, 775.
(*c*) Hawk. P. C. b. 2, c. 37, s. 8; 4 Black. Com. 400; 1 Chitty's C. L. 770.

ART. 3.

The effect of a pardon after judgment is not merely to prevent the execution of such judgment, but to give the offender new credit, capacity, and character; (*d*) provided that no disability specially imposed upon him by law as the consequence of his conviction shall be removed by any such pardon; (*e*) nor, without express words of restitution, shall any property which the offender has forfeited by his conviction or attainder be revested in him; (*f*) provided also, that after attainder, (except where the pardon is by Act of Parliament,) the corruption of the offender's blood shall not be removed by a pardon, except only as regards those of his blood born after such pardon was granted, and that none of the consequences of such

previous corruption of blood, as regards the property of the offender or otherwise, shall be stayed or prevented by such pardon. (*g*)

(*d*) Hawk. P. C. b. 2, c. 37, s. 48; 4 Black. Comm. 402; 1 Chitty's C. L. 775.
(*e*) Hawk. P. C. b. 2, c. 46, s. 112; 1 Chitty's C. L. 776, and the cases there cited.
(*f*) Hawk. P. C. b. 2, c. 35, s, 54; Chitty's Burn's Justice, tit. "Pardon."
(*g*) Hawk. P. C. b. 2, c. 37, s. 55; 4 Black. Comm. 402; 1 Chitty's C. L. 776, and the cases there cited.

ART. 4.

Where the Queen shall be pleased to extend Her royal mercy to any offender convicted of any felony punishable with death or otherwise, and by warrant under her royal sign manual, countersigned by one of Her principal Secretaries of State, shall grant to such offender either a free or conditional pardon, the discharge of such offender out of custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon under the great seal for such offender, as to the felony for which such pardon shall be so granted: Provided always, that no free pardon, nor any such discharge in consequence thereof, nor any conditional pardon, nor the performance of the condition thereof in any of the cases hereinbefore in this Article mentioned, shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any felony committed after the granting of any such pardon. (*h*)

(*h*) 7 & 8 Geo. IV. c. 28, s. 13.

SECTION 4.

Plea denying the identity of the Prisoner.

ART. 1.

WHERE non-identity of person shall be alleged in bar of the execution of a judgment in any criminal case, the like rules and regulations as regards the trial of such non-identity shall apply as are applicable where non-identity is pleaded in arrest of judgment. (*a*)

(*a*) 1 Chitty's C. L. 777.

SECTION 5.

Suspension of Execution of Judgment by Reprieve.

ART. 1.

IN capital cases the execution of the judgment may be suspended by a reprieve. (*a*)

(*a*) 4 Black. Comm. 394; 1 Chitty's C. L. 756.

ART. 2.

A reprieve is the withdrawal of the judgment for an interval of time, and may be granted either by the Crown or by the Court empowered to award execution against the offender. (*b*) By whom grantable.

(*b*) 1 Hale's P. C. 368: 2 Hale's P. C. 412; Hawk. P. C. b. 2, c. 51, s. 8; 1 Chitty's C. L. 758.

ART. 3.

A reprieve is grantable by the Crown at its mere discretion, expressed to the Court empowered to award execution against the offender, whereupon such Court is bound to respite such offender accordingly. (*c*) By the Crown at its discretion.

(*c*) 1 Hale's P. C. 368; 2 Hale's P. C. 412; Hawk. P. C. b. 2, c. 51, s. 8; 1 Chitty's C. L. 758.

ART. 4.

The means used to express the pleasure of the Crown are immaterial, provided they be sufficient to express that purpose. (*d*)

(*d*) 1 Hale's P. C. 368; 2 Hale's P. C. 412; Hawk. P. C. b. 2, c. 51, s. 8; 1 Chitty's C. L. 758.

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ART. 5.

By the Court at its discretion.

A reprieve is grantable by the Court at discretion whenever substantial justice requires the withdrawal of the judgment. (*e*)

(*e*) 2 Hale's P. C. 412; 4 Black. Comm. 394; 1 Chitty's C. L. 758, 9, and the cases there cited.

ART. 6.

When the Court bound to grant a reprieve.

In the following cases the Court is bound to grant a reprieve:—

1st. Where the offender, being a female, is pregnant. (*f*)

2nd. Where the offender becomes insane after judgment pronounced against him. (*g*)

(*f*) 3 Inst. 17, 18; 1 Hale's P. C. 368; 2 Hale's P. C. 406, 413; Hawk. P. C. b. 2, c. 51, s. 9; 4 Black. Comm. 395; 1 Chitty's C. L. 759.

(*g*) 3 Inst. 4; 1 Hale's P. C. 370; Hawk. P. C. b. 1, c. 1, s. 4; 4 Black. Comm. 395; 1 Chitty's C. L. 761.

ART. 7.

In order that female offenders, (*h*) and, where an interval has elapsed since judgment was pronounced, other offenders (*i*) may have an opportunity of alleging the matters specified in the last preceding Article respectively, the proper officer then being present in Court shall require and ask if such offenders have or know any thing to say why execution should not be awarded against them, according to the judgment of the Court.

(*h*) 2 Hale's P. C. 407; 1 Chitty's C. L. 759, 760; Steph. C. L. 334.

(*i*) 1 Hale's P. C. 368; 4 Black. Comm. 396; 1 Chitty's C. L. 760, 761.

ART. 8.

Pregnancy.

Where a female offender shall upon a capital conviction allege, or the Court shall otherwise have reason to suppose, that she is pregnant, then upon its being proved to the satisfaction of the Court that such is the case, the Court shall respite such offender until the next term or assizes, as the case may be, and so on from time to time until she be delivered of a child, or it is no longer possible, in the course of nature, that she should be so delivered. (*k*)

(*k*) 4 Black. Comm. 395; 1 Chitty's C. L. 760. We recommend the abrogation of the present barbarous course of having a jury of matrons to try whether a female convict be quick with child or not. Pregnancy alone should be a sufficient ground of respite; and we think that it ought to be enough if that fact be made out to the satisfaction of the Court, which, where any doubt existed, would of course require medical testimony upon the point.

ART. 9.

After the delivery of such female offender, or where such delivery is no longer possible, as in the last preceding Article is mentioned, or where it shall not be made out to the satisfaction of the Court that such offender is pregnant, the Court, at the expiration of the period to which it has respited such offender, shall proceed to award execution against her; but, before doing so, the proper officer then being present in Court, shall again inquire and ask if she hath, or knoweth anything to say why execution should not be awarded against her, in order that she may have an opportunity of alleging any further matter or thing sufficient in law to prevent or suspend such execution. (*l*)

(*l*) 1 Hale's P. C. 369; 2 Hale's P. C. 414; 1 Chitty's C. L. 760.

According to Lord Hale (1 Pl. of Crown, 369), where a woman has once had the benefit of a reprieve and been delivered, and afterwards becomes pregnant again, she is not entitled to the benefit of a further respite for that cause; but as this is contrary to the principle upon which the woman is respited in the first instance, viz., tenderness towards the innocent infant, and as, in all probability, were such a case to arise, the Court would exercise its discretionary power of reprieving, we have abstained from inserting any such exception in the Digest.

ART. 10.

Insanity.

Where an offender becomes insane after judgment pronounced against him, execution against him is to be respited; provided the fact be found by means of an *ex-officio* inquiry by a jury, or otherwise sufficiently appear. (*m*)

(*m*) See Hale's P. C. 35; 4 Bl. Comm. 24; 1 Chitt. C. L. 762.

ART. 11.

Judges of assize may reprieve after their commission is determined.

Judges of assize have the power of reprieve after their commission is determined. (*n*)

(*n*) The continuance of the power is said to be rather of common usage than of strict right, 2 Hale 12; 4 Black. Comm. 387; Hawk. P. C. b. 2, c. 2, s. 8; it is, however, very desirable that they should possess this power.

CHAPTER X.

EXECUTION OF JUDGMENT.

Art. 1.

By whom to be executed.

Where the execution of the judgment pronounced against any offender shall not be prevented or suspended in manner as in the last preceding Chapter is mentioned, or having been suspended, the period of such suspension shall have expired, such judgment is to be executed according to law, by the sheriff or other proper officer duly authorized for that purpose, or his lawful deputy. (*a*)

(*a*) 4 Black. Comm. 403; See 2 Hale's P. C. 410; Steph. C. L. 339; 1 Chitty's C. L. 780, *et seq.* It is not possible to show who is the proper officer, or the manner in which the various judgments which may be pronounced against offenders are to be executed without going into the whole of the laws relating to transportation, prison discipline, &c., subjects too extensive to be inserted in a mere digest of procedure.

Art. 2.

Execution to be awarded although the prisoner stand mute.

Execution is to be awarded although the party, on demand made why execution should not be awarded against him, stand mute. (*b*)

(*b*) Hawk. P. C. b. 2, c. 30, s. 8.

Art. 3.

May be awarded in Queen's Bench against persons attainted in any other Court.

The Court of Queen's Bench may award execution against any person attainted in that or any other court; the record of attainder, or a transcript thereof in the latter case, being first removed into the Court of Queen's Bench, and the party attainted being brought thither by writ of *habeas corpus*. (*c*)

(*c*) Hawk. P. C. b. 2, c. 51, s. 1.

Art. 4.

Execution of outlaw.

On judgment of outlawry for any capital offence, the party against whom such judgment is pronounced shall forfeit and lose as if sentence had been pronounced on a verdict or confession (*d*), and execution shall be awarded against him.

(*d*) Hawk. P. C. b. 2, c. 48, s. 22.

Art. 5.

Execution may be done without writ.

A criminal court may award execution to be done without writ. (*e*)

(*e*) Hawk. P. C. b. 2, c. 51, s. 4.

Art. 6.

No execution is lawful which varies from the judgment, except such variation be warranted by some express and lawful authority. (*f*)

(*f*) Hawk. P. C. b. 2, c. 51, s. 5. The Crown cannot vary the execution so as to aggravate the punishment, but may, by virtue of its prerogative, either pardon the offender or mitigate the punishment, Fost. 269, 270; 1 Burr. 650; 4 Black. Comm. 398; and therefore it is not criminal in an officer to obey the warrant from the Crown so mitigating the punishment.

Art. 7.

Manner of proceeding in cases of extension of mercy to offenders convicted of capital offences.

When any person shall be convicted at any session of oyer and terminer, or gaol delivery, of any crime punishable by death, if Her Majesty shall be pleased to extend mercy to any such offender upon condition of imprisonment, or upon condition of imprisonment with hard labour, and such intention of mercy shall be signified by one of Her Majesty's principal Secretaries of State to the court before whom such offender shall be convicted, or any subsequent court, with the like authority, such court shall allow to such offender the benefit of a conditional pardon, and make an order for the imprisonment of such offender with or without hard labour, as the case may be; and in case such intention of mercy shall be so signified to the judge before whom such offender shall be convicted, or to any judge of the Court of Queen's Bench, Common Pleas, or Exchequer, such judge shall allow to such offender the benefit of a conditional pardon, and make an order for such imprisonment of such offender, in the same manner as if such intention of mercy had been signified to the court during the term or session in or at which such offender was convicted, and such allowance and order shall be considered as an allowance and order made by the court before which such offender was convicted, and shall be entered on the records of the same court, by the proper officer thereof, and shall be as effectual to all intents and purposes, and have the same consequences, as if such allowance and order had been made by the same court

during the continuance thereof; and every such order shall subject the offender to be so imprisoned. (*g*)

(*g*) 11 Geo. IV., and 1 Will. IV. c. 39, s. 7.

ART. 8.

Time and place of execution in capital cases.

In capital cases execution is to be done upon the offender at the time and at the place specified in the warrant for his execution, if any time and place be specified, otherwise at such convenient time and place as such sheriff, officer, or deputy, as in Article 1 is mentioned, shall think proper to appoint. (*h*)

(*h*) 4 Black. Comm. 404; Steph. C. L. 339; 1 Chitty's C. L. 782.

ART. 9.

Where judgment is removed by certiorari, the Queen's Bench may direct execution to be done.

Where the record of a conviction and judgment for murder have been removed into the Court of Queen's Bench under the provisions of Article 15 of Section 1 of Chapter XI., it shall be lawful for such court to direct execution to be done upon the prisoner, either by the sheriff of the county where such prisoner was convicted and sentenced, or by the Sheriff of Middlesex, or by the Marshal of the Queen's Bench. (*i*)

(*i*) R. *v.* Garside, 2 Ad. & Ell. 266.

ART. 10.

Offender to be hanged again, if taken down before dead.

If the offender, after hanging, be cut or taken down before he be actually dead, he shall be hanged by the neck again until he be dead. (*k*)

(*k*) 2 Hales P. C. 412; 4 Black. Comm. 405; Steph. C. L. 340.

ART. 11.

Acts regulating the punishment of offenders sentenced to be transported.

The punishment of offenders convicted of any crime which subjects them to transportation is regulated by the following Acts, that is to say, by an Act passed in the fifth year of the reign of King George IV., intituled "An Act for the transportation of offenders from Great Britain;" another Act passed in the sixth year of the same reign, intituled "An Act for punishing offences committed by Transports kept to hard labour in the Colonies, and better regulating the powers of Justices of the Peace in New South Wales;" another Act passed in the session of Parliament, holden the 11th year of the reign of King George IV., and the first year of the reign of King William IV., intituled "An Act to amend an Act passed in the fifth year of His present Majesty for the Transportation of offenders from Great Britain, and for punishing offences committed by Transports kept to hard labour in the Colonies;" another Act passed in the session of Parliament holden in the first and second years of Her present Majesty's reign, intituled "An Act for establishing a Prison for Young Offenders;" another Act passed in the session of Parliament holden in the fifth and sixth years of the same reign, intituled "An Act for establishing a Prison at Pentonville;" another Act passed in the session of Parliament holden in the sixth and seventh years of the same reign, intituled "An Act to amend the Law affecting Transported Convicts, with respect to Pardons and Tickets of Leave;" another Act passed in the same session of Parliament, intituled "An Act for regulating the Prison at Millbank;" and another Act passed in the session of Parliament holden in the 10th and 11th years of the present Queen's reign, intituled "An Act to amend the Law as to the Custody of Offenders."

ART. 12.

Commitment in execution.

The Court of Queen's Bench may commit an offender in execution to any legal gaol within the kingdom. (*l*)

(*l*) 8 T. R. 176; Barnes, 385; 3 Inst. 100; 1 Chitt. C. L. 800.

ART. 13.

Execution of sentence where prisoners convicted in county next adjoining to a county of a town corporate.

Where any conviction shall have taken place in pursuance of the provisions of Article 23 of Section 1 of Chapter II., or of Article 11 of Section 1 of Chapter VII. of this Act, it shall be lawful for the court before which any such conviction shall have so taken place, to order any such convict to be punished according to law, either within the county where such conviction shall have taken place, or within the county of the city or town corporate wherein such offence shall have been committed; and in cases where the court shall order such convict to be punished within the county of such city or town corporate, it shall be lawful for the court, after passing sentence on any such convict, to order him to be delivered

into the custody of the sheriff or sheriffs, gaoler, or other proper officer or officers of the county of such city or town corporate, and the sheriff or sheriffs, gaoler, or other proper officer or officers of the county of such city or town corporate, is and are hereby commanded to receive into his or their custody every such convict, and to execute the sentence so passed upon him, in such adjoining county, as if he had been tried and had received such sentence in the county of such city or town corporate. (*m*)

(*m*) 38 Geo. III. c. 52; 51 Geo. III. c. 100, s. 1.

Art. 14.

Imprisonment of offenders convicted at assizes or sessions.

Prisoners convicted at any sessions of the peace (*n*), or at the assizes, may be imprisoned in the common gaol.

(*n*) See 5 H. 4, c. 10.

Art. 15.

Acts regulating the punishment of offenders sentenced to be imprisoned.

The punishment of offenders convicted of any crime which subjects them to imprisonment, is regulated by an Act passed in the fourth year of King George IV., intituled "An Act for consolidating and amending the Laws relating to the Building, Repairing, and Regulating of certain Gaols and Houses of Correction in England and Wales;" another Act passed in the fifth year of the same reign, intituled "An Act for amending an Act of the last Session of Parliament relating to the Building, Repairing, and Enlarging of certain Gaols and Houses of Correction; and for procuring information as to the state of all other Gaols and Houses of Correction in England and Wales;" and another Act passed in the session of Parliament holden in the fifth and sixth years of the reign of King William IV., intituled "An Act to provide for the regulation of Municipal Corporations in England and Wales."

Art. 16.

How persons convicted of offences for which they are liable to death, &c. shall be disposed of.

Whensoever any offender shall be convicted at any assizes or sessions of the peace of any offence for which he shall be liable to the punishment of death, transportation, or imprisonment, it shall be lawful for the court (if it shall so think fit) to commit such person to any house of correction for the county in execution of his judgment. And in case of the commitment of any person sentenced to death, execution of such judgment shall be had and done by the sheriff of the county. And in case of the commitment of any person either sentenced to transportation, or pardoned for any capital offence on condition of transportation, all the powers, provisions, and authorities for the removal of offenders sentenced to transportation, given or granted by any former Act or Acts of Parliament to sheriffs or gaolers, shall be, and the same are hereby extended and given to the keepers of houses of correction in whose custody such last-mentioned offender shall be. (*o*)

(*o*) 5 & 6 Wm. IV. c. 38, s. 4.

Art. 17.

Execution-fine.

If a defendant, on a charge of misdemeanor, be present at the passing of the sentence, the court or judge may commit him in execution of the judgment, or until he shall have paid any fine imposed. (*p*)

(*p*) Corner's P. 149. This is the course as regards the Court of Queen's Bench, and ought, we conceive, to be a general rule.

Art. 18.

Writ to take convict if not in custody.

After judgment a writ of *capias ad satisfaciendum* may be issued to bring in the party convicted if he be not already in custody. (*q*)

(*q*) See Corner's Forms, 112.

Art. 19.

If the party cannot be taken he may be pursued to outlawry. (*r*)

Outlawry.

(*r*) Such process may, it seems, according to the authorities, be issued from a Court of Quarter Sessions. See 2 Hale, 199; 12 Co. 133, Talf. Dickenson's Quarter Sessions, 601. But we have recommended (see above note to Article 2 of Section 4 of Chapter III. of this Act) that where it is intended to proceed to outlawry, the proceedings should be first removed by *certiorari* into the Court of Queen's Bench.

Art. 20.

Where term of imprisonment expires on Sunday,

Every person confined in any prison whose term of imprisonment would, according to his sentence, have expired on any Lord's-day, shall be entitled to his discharge

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Prisoner to be discharged on preceding day.

from such prison on the Saturday next preceding such Lord's-day; and every keeper, governor, or other officer of any prison having the custody of any such prisoner, is hereby required to discharge such prisoner on the Saturday next preceding any such Lord's day. (*s*)

(*s*) 5 & 6 Will. IV. c. 38, s. 12.

ART. 21.

Her Majesty may order prisoners to be removed from one prison to another.

It shall be lawful for Her Majesty, by an order in writing, to be notified in writing by one of Her Majesty's Principal Secretaries of State, to direct that any person in prison under sentence of any Court or of any competent authority, for any offence committed by him, shall be removed from the prison in which he is confined to any other of Her Majesty's prisons or penitentiaries within England and Wales, there to be imprisoned for and during his term of imprisonment. (*t*)

(*t*) 5 & 6 Will. IV. c. 38, s. 11.

ART. 22.

Fine imposed in Queen's Bench, how to be levied.

A fine imposed in the Court of Queen's Bench is to be levied by a writ of *fieri facias* directed to the sheriff of the county, or other the proper officer of the particular jurisdiction. (*u*)

(*u*) See the Form, Corner's Forms.

ART. 23.

Fines, &c., imposed in Queen's Bench or at Assizes, how to be recovered.

All fines, issues, and penalties, set or imposed in the Court of Queen's Bench, or at the assizes, if not paid, may be recovered according to the provisions of an Act passed in the Session of Parliament holden in the 3rd and 4th years of the reign of King William IV., intituled "An Act for facilitating the appointment of Sheriffs, and the more effectual audit and passing of their Accounts, and for the more speedy return and recovery of Fines, Issues, Forfeited Recognizances, Penalties, and Deodands, and to abolish certain offices in the Court of Exchequer." (*v*)

(*v*) 3 & 4 Will. IV. c. 99. This statute contains numerous regulations, many of them of a fiscal character, concerning not merely fines for indictable offences, but also for other penalties and amerciaments; and also for issues, forfeited recognizances, and deodands: they are not peculiar to the proceeding in respect of indictable offences, and would still be necessary for other purposes,—to insert those provisions in this Act would therefore be to cause a useless repetition in the Statute Book, without, as it seems, any adequate advantage.

ART. 24.

How to be recovered, when imposed at sessions or in borough courts.

All fines, issues, and penalties, set or imposed in any Court of session of the peace, or at any session of any Court of any city, borough, or place, if not paid, may, unless it be otherwise specially provided, be levied according and subject to the provisions contained in two Acts passed, the one in the third year of the reign of King George IV., and intituled "An Act for the more speedy return and levying of Fines, Penalties, and Forfeitures, and Recognizances estreated," and the other, in the fourth year of the same King's reign, intituled "An Act to amend an Act for the more speedy return and levying of Fines, Penalties, and Forfeitures, and Recognizances estreated," and in the Act in the last preceding Article referred to. (*w*)

(*w*) 3 Geo. IV. c. 46; 4 Geo. IV. c. 37. The observations already made in the last preceding note are applicable also to this Article. The language has been a little altered to make it agree with that of the statute 3 & 4 Will. IV. c. 99.

ART. 25.

Fines, penalties, and forfeitures, for not repairing highways, how to be levied and applied.

No fine, issue, penalty, or forfeiture for not repairing the highway, or not appearing to any indictment for not repairing the same, shall be returned into the Court of Exchequer, or other Court, but shall be levied by and paid into the hands of such person residing in or near the parish where the road shall lie, as the justices or Court imposing any such fine, issue, penalty or forfeiture shall order and direct, to be applied towards the repair and amendment of such highway; and the person so ordered to receive such fine shall, and is hereby required to receive, apply, and account for the same according to the direction of such justices or Court, or in default thereof, shall forfeit double the sum received; and if any fine, issue, penalty, or forfeiture to be imposed for not repairing the highway, or not appearing to any indictment for not repairing the same, shall hereafter be levied on any inhabitant of such parish, township, or place, then such inhabitant shall and may make his complaint to the justices at a special sessions for the highways; and such justices are

hereby empowered and authorized by warrant under their hands, to make an order on the surveyor of the parish for payment of the same out of the money receivable by him for the highway rate, and such surveyor shall, within two months next after service of such order on him, pay unto such inhabitant the money therein mentioned. (*x*)

(*x*) 5 & 6 Will. IV. c. 50, s. 96.

ART. 26.

Where inhabitants of a parish or other district have been convicted in the Court of Queen's Bench for not repairing a highway, they may be distrained *ad infinitum* till the road be repaired. (*y*)

(*y*) Corner's P. 154.

ART. 27.

Mode of executing writs of *capias pro fine* or *utlagatum*.

A peace officer may, in execution of a writ of *capias pro fine* or *capias utlagatum*, break open any outer door or window of a dwelling-house, if after notification of his office and purpose, and demand of admittance duly made, he cannot otherwise obtain admittance. (*z*)

(*z*) 1 Hale, 459; Hawk. P. C. b. 2, c. 14, s. 4; 1 Russ. on Cri. and Misd. 3rd ed. 628.

ART. 28.

The dwelling-house of a third person is not privileged, provided the party sought be therein, and any outer door or window thereof may be broken for any purpose specified in the last preceding Article, if after such notification and demand as are mentioned in that Article, admittance cannot otherwise be obtained. (*a*)

(*a*) 1 Russ. on Cri. and Misd. 3rd ed. 631.

ART. 29.

The rules contained in Articles 60 and 61 of Section 1 of Chapter I. of this Act shall apply as well to peace officers acting in execution of either of the writs mentioned in Article 27 of this Section, as to persons proceeding to arrest any party under the provisions of such first-mentioned two Articles.

ART. 30.

Writ of restitution.

Upon an indictment found for a forcible entry or detainer before any Court of oyer and terminer, gaol delivery, or quarter session of the peace, such Court may award a writ of restitution for the purpose of restoring the party, who is found by such indictment to have been put out of the actual possession, to the possession of the lands or tenements in respect of which such offence is alleged to have been committed. (*b*)

(*b*) See 8 Hen. VI. c. 9. Bac. Ab. tit. "Forcible Entry," (F.) It has been said that restitution cannot in such case be awarded by justices of oyer and terminer or gaol delivery, *ib.*; and 1 Haw. P. C. c. 64, s. 51. This, however, has been doubted, Com. Dig. "Forcible Entry," D. 5; and there seems at all events to be no sufficient reason why Courts of oyer and terminer and gaol delivery should not have the power.

ART. 31.

So where an indictment so found for a forcible entry or detainer as in the last preceding Article is mentioned is removed into the Court of Queen's Bench by writ of *certiorari*, that Court may award a writ of restitution in manner mentioned in the last preceding Article. (*c*)

(*c*) Hawk. P. C. b. 1, c. 64, s. 51.

ART. 32.

The granting of a writ of restitution by the Court of Queen's Bench, or by any Court of oyer and terminer, gaol delivery, or session of the peace, is discretionary. (*d*)

(*d*) R. *v.* Harland, 8 Ad. & Ell. 826; 1 P. & D. 93; 2 M. & R. 826; 1 Russell (by Greaves), 314. It should be observed that the writ of restitution intended by this Section is only upon *indictment* found. In the case of local justices, to whom authority is given by the 8 Hen. VI. c. 9, to go to the spot and inquire summarily, by the inquisition of a jury to be summoned under the provisions of that Act, and by the examination of witnesses, if the jury find the facts, it is imperative on the justices to grant restitution: the reason being that there has been a fair inquiry. Reg. *v.* Harland, 8 Ad. & Ell. 826, per Patteson, J. Whereas, in cases where there has been no such inquisition, the proceedings are *ex parte* only, *ib.*

ART. 33.

No writ of restitution shall be awarded upon an indictment for a forcible entry or detainer where the person indicted has had the occupation or been in quiet possession of the lands or tenements in respect of which such offence has been com-

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mitted for the space of three whole years without interruption next before such indictment found, (*e*) his estate therein being a lawful one (*f*) and undetermined; and the person so indicted may allege such occupation or possession in stay of restitution; whereupon, if the prosecutor will deny or traverse the same, restitution shall be stayed until such allegation shall be tried; and in case it be found against the person so indicted, then he shall pay such costs and damages to the prosecutor as shall be assessed by the Court before which the same shall be tried, such costs and damages to be recovered and levied in the same manner as is usual in the case of costs and damages in judgments upon other actions. (*g*)

(*e*) Bac. Abrid. tit. "Forcible Entry, &c.," (G.); 1 Hawk. P. C. c. 64, s. 53.
(*f*) Bac. Abrid. tit. "Forcible Entry, &c.," (G.); 1 Hawk P. C. c. 64, s. 54.
(*g*) 31 Eliz. c. 11, s. 3. The language of this provision has been modernized

ART. 34.

Superseding writ of restitution.

The same Court which has awarded a writ of restitution on an indictment for a forcible entry or detainer may supersede such restitution upon its being made to appear to such Court that such indictment is insufficient. (*h*)

(*h*) Bac. Ab. "Forcible Entry." And see note to Article 32.

ART. 35.

Writ of re-restitution.

The Court of Queen's Bench, on just cause shown, may grant a writ of re-restitution, to restore the defendant to his possession, in case an indictment on which a writ of restitution has been granted be removed into that Court by writ of *certiorari* and quashed. (*i*)

(*i*) Hawk. P. C. b. 1, c. 64, ss. 63, 64, 65.

ART. 36.

By whom to be executed.

Writs of restitution and re-restitution are to be executed as other writs of execution are, by the sheriff. (*k*)

(*k*) Corner's P. 251.

ART. 37.

But the justice or justices of the peace awarding restitution on an indictment taken before them, may either execute the writ in person or issue a precept directing the sheriff to execute the award. (*l*)

(*l*) Hawk. P. C. b. 1, c. 64, s. 49.

ART. 38.

Second writ, if first avoided by a fresh force.

If possession under a writ of restitution be avoided immediately after execution by a fresh force, a second writ is issuable, provided it be applied for within a reasonable time. (*m*)

(*m*) R. *v.* Harris, 1 Ld. Ray, 482.

ART. 39.

Within what time restitution to be awarded.

Restitution cannot be awarded after the expiration of three years from the finding of the indictment for a forcible entry or detainer. (*n*)

(*n*) This is in the case of an inquisition under the 8 Hen. VI. c. 9. R. *v.* Harris, 3 Salk. 313; and we presume that the same rule applies to restitution when awarded upon indictment found.

ART. 40.

Mode of executing.

An outer door or window of a dwelling-house may, if necessary, be broken open in order to execute any writ of restitution or re-restitution. (*o*)

(*o*) Com. Dig. "Forcible Entry," D. 6. The authorities on this subject relate to restitution upon indictments for a forcible entry or detainer, but we submit that upon principle the rule should apply to writs of restitution in other cases as well.

ART. 41.

Restitution of stolen, &c., property.

If any person guilty of stealing, embezzling, or obtaining by any false pretence, or of wilfully and unlawfully receiving or having in his possession or keeping anything being the subject of theft, shall be indicted for any such offence, by or on the behalf of the owner of such thing, or his executor or administrator, and convicted thereof, in such case such thing shall be restored to the owner or his representative: and the Court before whom any such person shall be so convicted shall have power to award from time to time writs of restitution for any such thing, or to order the restitution thereof in a summary manner: Provided that if it shall appear before any award or order made that any such thing being a valuable secu-

rity shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had been so stolen, embezzled, obtained, received or had in his possession or keeping; in such case the Court shall not award or order the restitution of such security. (*p*)

(*p*) See the 7 & 8 Geo. IV. c. 29, s. 57.

ART. 42.

Provided also that the Court may order anything which has been purchased with stolen money to be delivered up, in cases where they have authority to order such money to be delivered up. (*q*)

(*q*) R. *v.* Powell, 7 C. & P. 600.

CHAPTER XI.

CERTIORARI, HABEAS CORPUS, COSTS OF PROSECUTIONS, AND FORFEITED RECOGNIZANCES.

SECTION 1.

Certiorari.

ART. 1.

A WRIT of *certiorari*, subject to the rules hereinafter in this Section mentioned, issues from the Court of Queen's Bench, at the instance of either a prosecutor or defendant, for the purpose of removing into that Court any indictment, together with all things touching the same, from any Court of oyer and terminer, gaol delivery, or session of the peace, or other inferior Court of criminal jurisdiction. (*a*)

(*a*) Hawk. P. C. b. 2, c. 27, ss. 22 and 27; R. *v.* Lewis, 4 Burr. 2456; R. *v.* Eaton, 2 T. R. 89.

ART. 2.

The Attorney-General, on behalf of the Crown, is entitled, on application, to a writ of *certiorari* as of right, either as prosecutor or when acting for a defendant, on account of his being an officer of the Crown, or for any other reason. (*b*)

(*b*) See 1 East, 303; R. *v.* Hammond, 4 T. R. 161; R. *v.* Eaton, 2 T. R. 89; R. *v.* Clace, 4 Burr. 2456. The Attorney-General cannot issue the *certiorari*: but on his application being indorsed, the writ is granted of course. R. *v.* Thomas, 4 M. & S. 744; R. *v.* Burgess, 1 Ld. Kenyon's Rep. 135.

ART. 3.

Motion in Queen's Bench, generally necessary before *certiorari* will issue.

In all other cases, where grantable, a writ of *certiorari* shall not issue from the Court of Queen's Bench for removing any indictment into that Court without motion first made in that Court in term time, or before a judge thereof in vacation, and the leave of such Court or judge (in whose discretion it is to grant or refuse the same as may seem just) obtained to remove such indictment. (*c*)

(*c*) 5 & 6 Will. & Mary, c. 11, s. 2 in part, and s. 4; 5 and 6 Will. IV. c. 33, ss. 1 and 2. The 5 & 6 Will. & Mary, c. 11, s. 2, requires the motion to be by counsel and the leave to remove the indictment to be by rule of Court; but it has appeared to us to be sufficient to follow the language of the 5 & 6 Will. IV. c. 33.

ART. 4.

Vacation.

Where a writ of *certiorari* is granted in vacation, the name of the judge who grants the same, and also the name of every person at whose instance the same is granted, shall be indorsed on such writ. (*d*)

(*d*) 5 & 6 Will. & Mary, c. 11, s. 4; 5 & 6 Will. IV. c. 33, s. 2, in part.

ART. 5.

Statutes which take away the writ of *certiorari* do not bind the Crown or any prosecutor unless that intention appear, but only the defendant. (*e*)

(*e*) R. *v.* Allen, 15 East, 341; R. *v.* Boultbee, 4 A. & E. 198; Corner's P. 51, and the cases there cited.

ART. 6.

What circumstances proper to be submitted to Court on application for *certiorari*.

Circumstances which render it probable that the defendant cannot have a fair and impartial trial in the Court below, or that specific legal difficulties are likely to

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arise upon the trial, or that questions of fact will arise requiring proof by the evidence of scientific persons, are proper to be submitted to the Court or judge on an application for a writ of *certiorari*. (*f*)

(*f*) R. *v.* Queen, 1 W. W. and H. 35; R. *v.* Jowl, 1 N. & P. 28; 5 Ad. and Ell. 539; R. *v.* Josephs, 8 Dowl. P. C. 128; R. *v.* Heywood, 4 Jur. 413; R. *v.* Lechmere, 4 Jur. 656; R. *v.* Hancock, 2 H. and W. 293; R. *v.* Matthews, 1 Chitt. 175, n.; R. *v.* Mead, 3 D. and R. 301; R. *v.* Lever, 1 W., W. and H. 35; Reban *v.* Trevor, 4 Jur. 292; R. *v.* Jones, 2 H. and W. 293; R. *v.* Fellowes, 4 Dowl. P. C. 607.

ART. 7.

Certiorari upon repairing highways, &c.

If upon an indictment against any person or persons, for not repairing any highway, causeway, pavement, or bridge, the right or title to repair the same may come in question, upon suggestion and affidavit made of the truth thereof, a writ of *certiorari* may be granted to remove the same into the Court of Queen's Bench. (*g*)

(*g*) 5 and 6 W. and M. c. 11, s. 6.

ART. 8.

It is not essential to the granting of a writ of *certiorari* under the provisions of the last preceding Article that the right or title to repair should come in question under a special plea: it may come in question, so as to warrant the granting such writ, although "not guilty" only be pleaded. (*h*)

(*h*) R. *v.* Taunton, St. Mary, 3 M. and S. 465.

ART. 9.

Bridges.

Provided that an indictment for not repairing the bridges and highways at the end of the bridges, mentioned in an Act passed in the 1st year of the reign of Queen Ann, intituled "An Act to explain and alter the Act made in the twenty-second year of King Henry VIII., concerning repairing and amending of bridges in the highways, and for repealing an Act made in the twenty-third year of Queen Elizabeth, for the re-edifying of Cardiffe Bridge in the county of Glamorgan, and also for changing the Day of Election of the Wardens and Assistants of Rochester Bridge," in cases where the county is charged with the repair of the same (*i*), is removable by writ of *certiorari* out of the county where such bridges or highways lie, at the instance of the prosecutor only. (*k*)

(*i*) R. *v.* Inhab. of Hamworth, 2 Stra. 900; 1 Barnard. 445; 5 W. and M. c. 11.
(*k*) 1 Ann. St. 1, c. 18, s. 5; R. *v.* Inhab. of Cumberland, 6 T. R. 194, affirmed by House of Lords, 3 B. and P. 354.

ART. 10.

Disorderly houses. False pretences.

No indictment which shall be preferred against any person for any offence against either of the Articles 3 or 5 of Chapter XI. (*l*) or against Section 2 of Chapter XVIII. (*m*) of the Act of Crimes and Punishments, shall be removed at the instance of such person by writ of *certiorari*.

(*l*) 25 Geo. II. c. 36, s. 10.
(*m*) 7 and 8 Geo. IV. c. 29, s. 52; 9 Dowl. P. C. 135.

ART. 11.

Recognizance to be entered into, before allowance of *certiorari*.

Every person indicted who shall obtain a writ of *certiorari* for removing any indictment whatsoever into the Court of Queen's Bench (not being in custody for want of bail to answer such indictment), shall, before the allowance of such writ, enter into a recognizance before a judge of the Court of Queen's Bench, or before a justice of the peace of the county or place in which the offence is charged to have been committed, or in which such person shall reside, in such sum and with such sureties as the Court of Queen's Bench, or any such judge shall, by indorsement on such writ, order and direct; which recognizance shall be with condition at the return of such writ to appear and plead to the indictment in the Court of Queen's Bench, and at his own costs and charges, to cause and procure the issue that shall be joined upon such indictment, or any plea relating thereunto, to be tried at the next assizes to be held for the county wherein such indictment was found, after such *certiorari* shall be returnable, if not in the cities of London or Westminster, or county of Middlesex, and if in such cities or county, then to cause or procure it to be tried the next term after that wherein such *certiorari* shall be granted, or at the sitting after that term, if the Court of Queen's Bench shall not appoint any other time for the trial thereof, and if any other time shall be appointed by the Court, then at such other time, and to give due notice of such trial to the prosecutor or his clerk in court, and that any party

prosecuting such writ shall appear from day to day in the Court of Queen's Bench, and not depart until he shall be discharged by such Court; and every person being in custody for want of bail to answer the charge contained in such indictment, shall be detained in custody until the like recognizances as are hereinbefore in this Article directed to be entered into (previously to the allowance of such writ of *certiorari*) shall have been entered into, or until such person shall be discharged by due course of law. (*n*)

(*n*) 5 and 6 Will. and Mary, c. 11, s. 2, in part; 8 and 9 Will. and Mary, c. 33; 5 and 6 Will. IV. c. 33, s. 2.

ART. 12.

Writ, at what time to be moved for.

A writ of *certiorari* to remove an indictment for misdemeanor may be applied for and issued before such indictment has been found, in the like cases, in the same manner and upon the same terms and conditions as if such writ of *certiorari* had been applied for after such indictment had been found. (*o*)

(*o*) 60 Geo. III. and 1 Geo. IV. c. 4, s. 4.

ART. 13.

At what time Indictment may be removed.

An indictment may, in the discretion of the Court or judge, upon sufficient cause shown, be removed by writ of *certiorari* at any time before final judgment. (*p*)

(*p*) The circumstances, it appears, must be very special before the Court will grant a certiorari after verdict. Hawk. P. C. b. 2, c. 27, s. 31; R. *v.* Nicholls, 2 Str. 1227; Carth. 6; R. *v.* Jackson, 6 T. R. 145; R. *v.* Potter, 2 Ld. Raym. 938; R. *v.* Inh. of Co. of Oxford, 13 East 411; but under such circumstances it will be granted, although the conviction be not upon trial but confession, R. *v.* Gwynne, 2 Burr. 749. It is said to be a good objection that issue has been joined in the Court below, and a *venire* awarded, Hawk. P. C. b. 2, c. 27, s. 10; there does not, however, appear to be any settled rule on this point; and see R. *v.* Passman, 2 Dowl. P. C. 529, from which it appears that an indictment may be removed at any time before trial.

ART. 14.

No record is removable by writ of *certiorari* after judgment, (*q*) except for the purpose of carrying the judgment into execution. (*r*)

(*q*) R. *v.* Inh. of Seton, 7 T. R. 373; R. *v.* Inh. of Penegoes, 1 Bar. and Cres. 142.
(*r*) Corner's P. 53.

ART. 15.

For the purpose mentioned in the last preceding Article, the Court or a judge on the application of the Attorney-General, may, after a conviction of murder and sentence of death at the assizes, grant a writ of *certiorari* to remove into the Court of Queen's Bench the record of the conviction and judgment, and also a writ of *habeas corpus* to bring up the prisoner so convicted and sentenced. (*s*)

(*s*) R. *v.* Garside, 2 Ad. and Ell. 266.

ART. 16.

A writ of *certiorari* will not be granted after an acquittal upon an indictment in the Court below in order to set aside a verdict for the defendant and grant a new trial, although such verdict has been surreptitiously obtained by a violation of the rules of practice of the Court below. (*t*)

(*t*) R. *v.* Unwin, 7 Dowl. P. C. 578; Corner's P. 53.

ART. 17.

The Court of Queen's Bench will quash a *certiorari* issued before but not served until after judgment on an indictment for a misdemeanor. (*u*)

(*u*) R. *v.* Inh. of Seton, 7 T. R. 373.

ART. 18.

Where several defendants.

A writ of *certiorari* may, at the discretion of the Court or judge, be granted on the application of one of several defendants. (*x*)

(*x*) R. *v.* Boxall and others, 4 Ad. and Ell. 513; Corner's P. 53; but see R. *v.* Hunt, 2 Chitt. R. 130.

ART. 19.

An indictment, when removed by writ of *certiorari*, upon such application as in the last preceding Article is mentioned, is removed as to all the defendants, and those who do not concur in the removal stand in the same situation as though the indictment were removed by the prosecutor. (*y*)

(*y*) Corner's P. 54, *i. e.* they are not bound to enter into any recognizance, and are not liable to costs, but may be held to bail.

ART. 20.

Where several defendants concur in the application for a writ of *certiorari*, each must enter into a separate recognizance in manner mentioned in Article 11 of this Section. (*z*)

(*z*) Corner's P. 57.

ART. 21.

Where indictment contains both charges in respect of which writ lies, and in respect of which it does not lie.

An indictment is removable by a defendant by writ of *certiorari* if it contain any charge in respect of which such writ lies at the instance of a defendant, although it also contain a charge in respect of which such writ does not so lie. (*a*)

(*a*) R. *v.* Saunders, 5 D. and R. 611; R. *v.* Fowler, 1 Ad. and Ell. 841.

ART. 22.

Effect of the writ.

A writ of *certiorari* is of no effect unless it be delivered before the time for its return has expired. (*b*)

(*b*) Hawk. P. C. b. 2, c. 27, s. 59.

ART. 23.

The effect of a writ of *certiorari* is to remove any record that shall come within the description contained in such writ before the time of its return, although there was no such record in existence at the time of the teste of such writ, nor at the time when it was first delivered to the Court below. (*c*)

(*c*) Hawk. P. C. b. 2, c. 27, s. 73; 60 Geo. III. c. 4, s. 4.

ART. 24.

The rule contained in the last preceding Article applies, although an indictment coming within the description in the writ has been discontinued in the Court below. (*d*)

(*d*) Ib. s. 74.—Qu.

ART. 25.

How to be obeyed.

The Court below is bound to obey a writ of *certiorari*, after notice and production of it before such Court; and such writ, being once delivered, makes all further proceedings of the Court below on the record intended to be removed by such writ erroneous, whether such proceedings be before or after the return of such writ. (*e*)

(*e*) Hawk. P. C. b. 2, c. 27, s. 59.

ART. 26.

Provided, nevertheless, that if the writ be not delivered before the jury have been sworn to try an indictment, the Court below may proceed with the trial of the same. (*f*)

(*f*) Hawk. P. C. b. 2, c. 27, s. 59; Corner's P. 53; R. *v.* North, 1 Salk. 143.

ART. 27.

Provided also that where the Court below has given judgment upon an indictment before the delivery of the writ, it may set a fine to complete its judgment after such delivery. (*g*)

(*g*) 2 Ld. Raym. 1515; but see above, and R. *v.* Seton, 7 T. R. 373.

ART. 28.

Provided also that the Court below may, notwithstanding the delivery of a writ of *certiorari*, if such recognizance as is mentioned in Article 11 of this Section has not been entered into where required by that Article, proceed as if no such writ had been produced before it; but such Court is to make a return stating the cause why the writ is not obeyed. (*h*)

(*h*) Hawk. P. C. b. 2, c. 27, s. 59; R. *v.* Bothill, 1 Salk. 149. It has, however, been said that if a *supersedeas* come out of a superior Court to the justices, they ought to surcease, although the *supersedeas* be awarded against law; for they are not to dispute the command of a superior Court, which is a command to them. (Cromp. 129*a*.)

ART. 29.

Return to writ.

The return to a writ of *certiorari* may be by indorsement on such writ, stating in substance that the execution of the writ appears by the schedules to the writ annexed.

ART. 30.

Such schedules must be on parchment, and are to be annexed to the writ of *certiorari*, and to consist in the record of the indictment mentioned in the writ, and all things touching the same, together with the caption of such indictment, and the recognizance mentioned in Article 11 of this Section (if any). (*i*) Requisites of.

(*i*) A return of the tenor only is insufficient, Askew *v.* Haydon, 1 Dowl. P. C. 510; Palmer *v.* Forsyth, 4 B. and C. 401; 6 D. and R. 497; Haw. P. C. b. 2, c. 29, s. 54; and therefore if it remove the record against the principal, a party charged as accessory before the fact cannot be tried in the Court below.

ART. 31.

The return to a writ of *certiorari*, where made from a Court of Quarter Sessions, should show the authority of the justices who make the return to hear and determine felonies and other offences according to the terms of the commission. (*k*)

(*k*) It is said in Dalton, c. 195, that the return to a *certiorari* to remove, which shows only that they are justices of the peace, without such words is insufficient.

ART. 32.

The return to a writ of *certiorari* should be made according to the form required by such writ; but the omission of the particular form so required cannot be objected to except by the Court of Queen's Bench itself. (*l*)

(*l*) Atkinson *v.* Rex, 3 Bro. P. C. 517.

ART. 33.

Where the return to a writ of *certiorari* is not properly authenticated, it is to be sent back to the Court which made it. (*m*)

(*m*) R. *v.* Kenyon, 6 B. and C. 640; R. *v.* Macnamara, 1 Alcock and Napier, 61.

ART. 34.

The return to a writ of *certiorari* should be made as soon as possible if the writ be returnable immediately; otherwise, on or before the first day of the ensuing term. (*n*) Within what time to be made.

(*n*) Corner's P. 58.

ART. 35.

In case of omission to make a return to a writ of *certiorari*, an *alias*, and then a *pluries* writ, or writ of *causam nobis significes* may be issued, and then an attachment. (*o*)

(*o*) Cromp. 116.

ART. 36.

Or, in case of such omission as in the last preceding Article is mentioned, a rule to return the writ of *certiorari* may be obtained at the Crown Office; and if such rule be not obeyed, an attachment may be issued. (*p*)

(*p*) Corner's P. 58.

ART. 37.

If the return to a writ of *certiorari* be improperly made so that the record returned is not well removed, the Court of Queen's Bench will quash such return and award a new writ of *certiorari*. (*q*)

(*q*) R. *v.* Baines, 2 Ld. Raym. 1199; Ashley's Case, 2 Salk. 479.

ART. 38.

On the removal of an indictment for felony into the Court of Queen's Bench, at the instance of the party indicted, the Court may order that such party shall be at liberty to plead by attorney, and may restrain the prosecutor and party indicted from bringing a writ of error on account of the plea being so pleaded. (*r*) Felony.

(*r*) R. *v.* Penpraze, 4 B. and Ad. 573.

ART. 39.

The Court of Queen's Bench in term time, or a Judge thereof, in vacation, will, at discretion, if it be made to appear that the writ of *certiorari* has been unduly obtained, or has issued illegally or improvidently, or has been unduly returned, or that the defendant has neglected to perform the conditions of the recognizance after having been ruled so to do, or that bad or insufficient bail have *Certiorari* improperly obtained.

been put in, or that the recognizance has been unduly entered into, or for other such just cause, award a writ of *procedendo*, or require the defendant to put in better bail, or quash the allowance and return of the writ. (*s*)

(*s*) Corner's P. 58.

ART. 40.

The writ of *procedendo* is to be annexed to the writ of *certiorari* and the indictment, and to be transmitted to the Court whence they came; and such Court is, according to the exigency of the writ of *procedendo*, to proceed as though no writ of *certiorari* had issued; and the recognizance in the Court of Queen's Bench is of no effect. (*t*)

(*t*) Corner's P. 59.

ART. 41.

Insufficient recognizances.

Where a defendant has been allowed, through his own improper interference, to enter into insufficient recognizances to take his trial in the Court below, the Court of Queen's Bench will, on application after the indictment has been removed by writ of *certiorari*, discharge such recognizances, and compel the defendant to give better security. (*u*)

(*u*) R. *v.* Hooper, 1 Chitt. R. 491.

ART. 42.

Costs.

If the defendant prosecuting a writ of *certiorari* be convicted of the offence for which he was indicted, then the Court of Queen's Bench shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, headborough, tithingman, churchwarden, or overseer of the poor, or any other civil officer, who shall prosecute upon the account of any fact committed or done that concerned him or them as officer to prosecute; which costs shall be taxed according to the course of such Court, and the prosecutor for the recovery of such costs shall, within ten days after demand made of the defendant, and refusal of payment on oath, have an attachment granted against the defendant by such Court for such his contempt; and the recognizance in Article 11 of this Section mentioned shall not be discharged till the costs so taxed shall be paid. (*y*)

(*y*) 5 and 6 Will. and Mary, c. 11, s. 3; 8 and 9 Will. III. c. 33; 5 and 6 Will. IV. c. 33, s. 2, in part.

ART. 43.

Nominal prosecutors who incur no expense, the expenses of prosecution being defrayed by public subscription or from public funds, are not entitled to costs within the provisions of the last preceding Article. (*z*)

(*z*) R. *v.* Cook, 1 M. and R. 526; R. *v.* Edwards, 5 B. and Ad. 407; R. *v.* Dewhurst, 5 B. and Ad. 405.

ART. 44.

A person who prosecutes for an intended or attempted injury, although he be not actually injured, is a party grieved within the meaning of Article 42 of this Section. (*a*)

(*a*) R. *v.* Williamson, 7 T. R. 32.

ART. 45.

A person injured at a riot, occasioned by a libel is not, on a prosecution for such libel, a party grieved within the meaning of Article 42 of this Section. (*b*)

(*b*) R. *v.* Caldecott, 1 Dowl. N. S. 556.

ART. 46.

A party is not entitled to costs within the meaning of Article 42 of this Section, who suffers no greater inconvenience from a nuisance than all the rest of the Queen's subjects do; but that Article includes a party who suffers any actual inconvenience from a common nuisance by erecting a steam-engine, (*c*) or omitting to repair a highway (*d*) used by such party, (*e*) or who otherwise suffer any loss, obstruction, or annoyance therefrom. (*f*).

(*c*) R. *v.* Inh. of Taunton, St. Mary, 3 M. and S. 465; Corner's P. 156.
(*d*) R. *v.* Dewsnap, 16 East, 194.
(*e*) R. *v.* Incledon, 1 M. and S. 268.
(*f*) R. *v.* Thompkins, 2 B, and Ad. 287.

ART. 47.

To entitle an officer to costs within the meaning of Article 42 of this Section, it is not sufficient that he be a magistrate, constable, or other officer, unless he prosecute *ex-officio* where it is his duty to prosecute on behalf of the public. (*g*)

(*g*) R. *v.* Sharpness, 2 T. R. 47; R. *v.* Kettleworth, 5 T. R. 33; R. *v.* Earl of Waldegrave, 2 Q. B. R. 341; Corner's P. 157.

ART. 48.

A defendant prosecuting a writ of *certiorari* is not liable to costs, although he be convicted, if judgment be arrested. (*h*)

(*h*) R. *v.* Turner, 15 East, 570.

ART. 49.

A defendant who pleads guilty, on an arrangement made that he shall not be brought up for judgment, without any stipulation as to costs, is not liable to costs. (*i*)

(*i*) R. *v.* Rawson, 2 B. and C. 598; and see R. *v.* Francis and others, T. T. 1836; Corner's P. 161.

ART. 50.

The provisions of Article 42 of this Section do not apply to the costs of any counts of an indictment on which a defendant is acquitted, (*k*) nor to any costs incurred previously to the removal. (*l*)

(*k*) R. *v.* Hawdon, 11 A. and E. 143.
(*l*) R. *v.* Passman, 1 A. and E. 603; R. *v.* Higgins, 5 Dowl. P. C. 375; Corner's P. 96.

ART. 51.

If the prosecutor, being entitled to costs, die after the taxation of costs, his personal representative shall be entitled to them. (*m*)

(*m*) R. *v.* Chamberlayne, 1 T. R. 103. For although the remedy by attachment fails, the debt remains.

ART. 52.

If a defendant having removed the indictment, and entered into the recognizance required by Article 11 of this Section, be found guilty, and die before judgment, his bail are liable to the costs. (*n*)

(*n*) R. *v.* Finmore, 8 T. R. 409; R. *v.* Turner, 3 B. and C. 160; Corner's P. 158.

ART. 53.

The amount of costs is not limited by the recognizance required by Article 11 of this Section. (*o*)

(*o*) R. *v.* Teal, 13 East, 4.

ART. 54.

The defendant is to pay all reasonable costs occasioned by the writ of *certiorari*, or incurred in consequence of it, in order to carry the prosecution to its legal conclusion. (*p*)

(*p*) R. *v.* Gilbie, 5 M. and S. 520.

ART. 55.

The last preceding Article includes the costs of conveying the defendant to gaol in execution of his sentence. (*q*)

(*q*) R. *v.* Gilbie, 5 M. and S. 520.

ART. 56.

Such of several defendants as do not consent to the removal of the indictment are not liable to costs. (*r*)

(*r*) R. *v.* Hassell, 5 Dowl. P. C. 628; R. *v.* Pembridge, 6 Jur. 1037; Harr. Ind. 7179.

ART. 57.

The recognizance may be estreated for non-payment of the costs of the prosecution, although the condition of the recognizance for the defendants appearing, pleading, and trying at his expense be performed. (*s*)

(*s*) R. *v.* Hawdon, 1 Q. B. R. 464; 1 G. and D. 135; R. *v.* Bezant, 7 Dowl. P. C. 680; Corner's P. 159.

ART. 58.

The Court of Queen's Bench has no power to award costs to the prosecutor, although the defendant has made a vexatious use of the writ. (*t*)

(*t*) As where the defendant, in order to put the prosecutor to expense, produced the *certiorari* at the sessions, after giving notice to the prosecutor of trial at those sessions, at which the prosecutor had accordingly attended with his witnesses. R. *v.* Wiggins, 5 Ad. and Ell. 554.

ART. 59.

Certiorari in County Palatine, &c., how granted.

Upon every *certiorari* granted or awarded within the county palatine of Lancaster or Durham, to remove indictments, all the parties indicted, prosecuting such *certiorari*, shall find such sureties, to be bound in such sums, and with such respective conditions, and at their own costs and charges shall cause and procure the issue joined upon such indictments to be tried at the next assizes or general gaol delivery to be held for such respective counties, and shall give like notice to the prosecutor, and, if convicted, shall be liable to the like costs, to be taxed as is provided for in cases where the same are granted or awarded out of the Court of Queen's Bench at Westminster. (*u*)

(*u*) 5 and 6 W. and M. c. 11, s. 5.

ART. 60.

Certiorari to remove depositions, &c.

A writ of *certiorari*, subject so far as the same are applicable to the rules hereinbefore in this Section contained, also issues from the Court of Queen's Bench at the instance of any person committed or detained for any criminal or supposed criminal matter, for the purpose of removing into that Court all informations, examinations, and depositions taken by or before any justice of the peace touching the commitment or detainer of such person for such criminal or supposed criminal matter.

ART. 61.

Indictment found at the sessions of the peace to be removed.

Any judge of one of Her Majesty's superior courts at Westminster, acting under any commission of oyer and terminer and gaol delivery for any county, may issue, if he shall think fit, any writ or writs of *certiorari* or other process, directed to the justices of the peace, for such county, or any riding, division, or liberty, or to the recorder of any borough situated within such county, commanding such justices or recorder to certify and return into the Court, holden under the authority of such commission of oyer and terminer and gaol delivery, all indictments found before any of such justices of the peace, or recorder, of any offences which such justices or recorder have not or has not jurisdiction to try, by virtue of Article 16 of Section 1 of Chapter VII. of this Act, and the several recognizances, examinations, and depositions relative to such indictments. (*x*)

And prisoners may be removed by writ of *habeas corpus*.

(*x*) 5 and 6 Vict. c. 38, s. 2, in part.

ART. 62.

Recognizances to be obligatory to appear at assizes.

Every recognizance which shall have been entered into for the prosecution of any person at any Court of sessions of the peace, for any offence which such Court shall not have jurisdiction to try, as in the last preceding Article is mentioned, and every recognizance for the appearance, as well of any witness to give evidence upon any bill of indictment for any such offence, as of any person to answer the Queen for or concerning any such offence, or to answer generally before such Court, shall, in case any writ of *certiorari* or *habeas corpus* be issued for the purpose of removing such indictment, or such person so in custody as in the last preceding Article or Article 35 of Section 2 of Chapter XI. of this Act respectively is mentioned, be obligatory on the parties bound by such recognizance to prosecute and appear, and give evidence and do all other things therein mentioned with reference to the indictment or person so removed before the justices of oyer and terminer and gaol delivery acting in and for that county, in like manner as if such recognizance had been originally entered into for prosecuting such offence, appearing or giving evidence, or doing such other things before such justices of oyer and terminer and gaol delivery: provided that one week's notice shall have been given, either personally or by leaving the same at the place of residence, as of which the parties bound by such recognizance are therein described, to appear before the Court of oyer and terminer and gaol delivery instead of such Court of sessions of the peace: provided also that the judge who shall grant such writ of *certiorari* or *habeas corpus* shall cause the party applying for such writ or writs, whether he be the prosecutor or party charged with such offence, to enter into a recognizance, in such sum, and with or without sureties as the judge may direct, conditioned to give such notice to the parties bound by such recognizance to appear before such Court of oyer and terminer and gaol delivery, instead of before such Court of sessions of the peace respectively, and to do such other things with reference to the indictment, or person removed as such Court or judge shall direct. (*y*)

(*y*) 5 and 6 Vict. c. 38, s. 3.

SECTION 2.

Habeas Corpus.

ART. 1.

WHERE any person is committed or detained for any criminal or supposed criminal matter the prerogative writ of *habeas corpus* issues out of the Court of Chancery, Queen's Bench, Common Pleas, or Exchequer, in term time, and upon the fiat of the Lord Chancellor, or of a judge of any of such Common Law Courts, in vacation, under the seal of such Courts respectively, directed to the officer in whose custody the person so committed or detained may be, commanding such officer to have before the Court from which the same issues, where issued in term time, and before the Lord Chancellor or the judge who granted the same, or any other judge of such Common Law Courts, where issued in vacation immediately after the receipt of such writ, the body of the person so committed or detained, together with the day and cause of his commitment or detainer, by whatsoever name he may be called therein, to undergo and receive such matters and things as such Court, Lord Chancellor, or judge shall respectively consider concerning him in that behalf. (*a*)

(*a*) Step. Comm. vol. iii. p. 695; 31 Car. II, c. 2, ss. 3 and 10; Crowley's Case, 2 Swanst. 1; R. *v.* Batcheldor (*re* Canadian Prisoners), 1 Per. and Dav. 516; S. C. nom. Leonard Watson's Case, 9 Ad. and Ell. 731; Hobhouse's Case, 3 B. and Ald. 420. By section 10 of the 31 Car. II. c. 2, s. 10, it is enacted that "if the Lord Chancellor, or Lord Keeper, or any judge or judges, baron or barons for the time being, of the degree of the coif, of any of the courts aforesaid, in the vacation time, upon view of the copy or copies of the warrant or warrants of commitment or detainer, or upon oath made that such copy or copies were denied as aforesaid, shall deny any writ of *habeas corpus*, by that Act required to be granted, being moved for as aforesaid, they shall severally forfeit to the prisoner or party grieved 500*l.*, to be recovered in manner aforesaid."

ART. 2.

Application for writ in term time must be on affidavit.

The application for such writ of *habeas corpus* as in the last preceding Article is mentioned, where made to the Court of Chancery, Queen's Bench, Common Pleas, or Exchequer, in term time, must be grounded on affidavit showing some probable cause for issuing the same, and the Court will thereupon exercise its discretion as to granting or refusing it. (*b*)

(*b*) R. *v.* Hobhouse, 3 B. & Ald. 420.

ART. 3.

The application for such writ of *habeas corpus*, as in Article 1 of this Section is mentioned, where made to a judge of the Court of Queen's Bench in vacation, must, unless it be made under the provisions of the next succeeding Article, be grounded on affidavit, showing some probable cause for issuing the same, and such judge will thereupon exercise his discretion as to granting or refusing it. (*c*)

(*c*) 3 Black. Comm. c. 8; Canadian Prisoners' Case, 9 Ad. and Ell. 736; S. C. 1 Per. and Dav. 526.

ART. 4.

An application in writing may be made for such writ of *habeas corpus* as is mentioned in Article 1 of this Section, to the Lord Chancellor, or a judge of any of the Courts of Queen's Bench, Common Pleas, and Exchequer, in vacation, by any person committed or detained for any crime except treason or felony [or any of the misdemeanors specified in Article 18 of Section 5 of Chapter I. of this Act], (*d*) plainly expressed in the warrant of commitment (such person not being convict nor in execution by legal process), or by any one on his behalf (such application to be attested and subscribed by two witnesses who were present at the delivery of the same), and thereupon such Lord Chancellor or judge is bound, upon view of a copy of the warrant of commitment or detainer, or otherwise, upon oath that such copy was refused to be given by the officer in whose custody such person is detained, to award and grant such writ. (*e*)

(*d*) We have inserted the words between brackets, because since the passing of the 11 & 12 Vict., c. 42, there is no distinction between the misdemeanors above referred to and felonies, as regards the right to be bailed—in both cases it is discretionary with the justice to commit or bail. The object of the 31 Car. II., c. 2, was to prevent persons lying in prison who were entitled to be bailed. It therefore excepted persons committed for treason or felony. Upon principle, therefore, we have excepted the misdemeanors before referred to.

(*e*) 31 Car. II. c. 2, s. 3, in part, and 21; R. *v.* Hobhouse, 3 B. and Ald. 420.

ART. 5.

All such writs of *habeas corpus*, as in Article 1 of this Section are mentioned, are to be marked "*Per statutum tricesimo primo Caroli Secundi Regis*," and to be signed by the person who awards the same, and may be directed and run into any

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county palatine, the cinque ports, or other privileged places within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, and the islands of Jersey or Guernsey. (*f*)

(*f*) 31 Car. II. c. 2, s. 3, in part, and 11.

ART. 6.

Within what time the writ of *habeas corpus* is returnable, &c.

Whensoever any person shall bring any such writ of *habeas corpus* as in Article 1 of this Section is mentioned, directed unto any such officer as in that Article is mentioned, for any person in his custody, and such writ shall be served upon such officer, or, in case he be not accessible (*g*), left at the gaol or prison with any of the under-officers, or under-keepers, or in case none such be accessible, with any deputy (*h*) of such officers or keepers, such officer, his under-officers, under-keepers or deputies, shall, within three days after such service thereof, if the place where such person is in custody is within 20 miles of the place where the Court, Lord Chancellor, or Judge, before which or before whom such writ is made returnable is or resides, and if beyond that distance and within 100 miles, then within 10 days, and if beyond 100 miles, then within 20 days after such service thereof (*i*), (unless the commitment of such person were for treason or felony [or any of the misdemeanors specified in Article 18 of Section 5 of Chapter I. of this Act] plainly and specially expressed in the warrant of commitment), upon payment or tender of the charges of bringing such prisoner, to be acertained by the Court or Judge that awarded the same, and indorsed upon such writ, not exceeding 12*d.* per mile, and upon security given by his own bond to pay the charges of carrying back the prisoner, if he shall be remanded by the Court or Judge to which he shall be brought, according to the true intent of the provisions of this Chapter, and that he will not make any escape by the way, make return of such writ, and bring or cause to be brought, the body of the person so committed or restrained before the Court, Lord Chancellor, or Judge, before which or before whom such writ is made returnable, according to the command thereof, and shall then likewise certify the true causes of his detainer or imprisonment. (*j*)

(*g*) See Huntley *v.* Luscombe, 2 Bos. and Pul. 530.
(*h*) Ib.
(*i*) It would be reasonable that the several times so allowed should be now shortened.
(*j*) 31 Car. II. c. 2, s. 2.

ART. 7.

Provided that if such writ of *habeas corpus* as in Article 1 of this Section is mentioned shall be awarded by the Court of Queen's Bench, Common Pleas, or Exchequer, so late in term time, that in the judgment of the Court obedience thereto cannot be conveniently paid during such term, the same may, at the discretion of the Court, be made returnable at a day certain in the then next vacation before any Judge of any of such Courts; and that if such writ shall be awarded so late in the vacation by any one of such Judges, that, in his opinion, obedience thereto cannot be conveniently paid during such vacation, the same may, at his discretion, be made returnable in the Court of which he shall be a Judge at a certain day in the next term. (*k*)

(*k*) 56 Geo. III. c. 100, ss. 2 and 6, in part.

ART. 8.

Disobedience of writ.

If any officer to whom any such writ of *habeas corpus* as is mentioned in Article 1 of this Section, made returnable in term time, shall be directed, shall wilfully neglect or refuse to make a return or pay obedience thereto, he shall be guilty of a contempt of the Court under the seal whereof such writ shall have issued, and an attachment shall immediately issue against him for his disobedience. (*l*)

(*l*) R. *v.* James Winton, 5 T. R. 89; 56 Geo. III. c. 100, ss. 2 and 6, in part.

ART. 9.

Non-obedience of such writ, to be a contempt of Court.

If any officer to whom any such writ of *habeas corpus* as is mentioned in Article 1 of this Section made returnable in vacation, shall be directed, shall wilfully neglect or refuse to make a return or pay obedience thereto, he shall be deemed guilty of a contempt of the Court under the seal whereof such writ shall have issued; and it shall be lawful for the Lord Chancellor or Judge, before whom such writ shall be returnable, upon proof made by affidavit of wilful disobedience of such writ, to issue a warrant signed by him and under his seal, for the apprehending and bringing before him, or where issued by a Judge, before some other Judge of the same Court, the person so wilfully disobeying such writ,

in order to his being bound to the Queen, with two sufficient sureties, in such sum as in the warrant shall be expressed, with condition to appear in the Court of Chancery or in the Court to which such Judge belongs respectively, at a day in the ensuing term to be mentioned in such warrant, to answer the matter of contempt with which he is charged; and in case of neglect or refusal to become so bound, it shall be lawful for such Lord Chancellor or Judge to commit such person so neglecting or refusing to the gaol or prison of his Court, there to remain until such person shall have become so bound, or shall be discharged by order of the Court in term time, or by order of the Lord Chancellor or one of the Judges respectively in vacation, and the recognizance to be taken thereupon shall be returned and filed in the same Court, and shall continue in force until the matter of such contempt shall have been heard and determined, unless sooner ordered by the Court to be discharged. (*ll*)

(*ll*) 56 Geo. III. c. 100, s. 2 and 6.

ART. 10.

It is no excuse for not obeying such writ of *habeas corpus* as in Article 1 of this Section is mentioned, that the officer to whom it is directed has not been paid or tendered the charges of bringing such prisoner according to the provisions of Article 6 of this Section; but they will be allowed by the Court or Judge on the return of the writ. (*m*)

(*m*) Chitty's C. L. p. 127, and the cases there cited. See however Corner's P. p. 114.

ART. 11.

If a return be made without bringing in the body, and such return be deemed to be insufficient, an attachment or warrant may be respectively granted under the provisions of Articles 8 and 9 of this Section, as though no such return had been made, unless the Court, Lord Chancellor, or Judge shall grant the officer a further day to obey the writ, or shall allow the return to be amended. (*n*)

(*n*) Corner's P. 116.

ART. 12.

Proceedings on return.

Upon a prisoner being brought before the Court in term time, by virtue of any such writ of *habeas corpus* as in Article 1 of this Section is mentioned, or before a Judge of the Court of Queen's Bench, in vacation, where such writ was obtained under the provisions of Article 3 of this Section, the Court or such Judge shall proceed to examine and determine whether the cause of commitment appearing upon the return be just and legal or not; and shall thereupon do what to justice shall appertain, either by delivering, bailing, or remanding the prisoner.

ART. 13.

Upon a prisoner being brought before the Lord Chancellor or a Judge, in vacation, by virtue of a writ of *habeas corpus* issued in pursuance of such application, as in Article 4 of this Section is mentioned, such Lord Chancellor or Judge shall, within two days after such prisoner shall be so brought, discharge him from his imprisonment, taking his recognizance, with one or more surety or sureties in any sum according to the discretion of such Lord Chancellor, or Judge, regard being had to the quality of the prisoner and nature of the offence, for his appearance in the Court of Queen's Bench the term following, or at the next assizes, sessions, or general gaol delivery for such county, city or place where the commitment was, or where the offence was committed, or in such other Court where such offence is properly cognizable, as the case shall require, and then shall certify such writ with the return thereof, and such recognizance into the Court where such appearance is to be made, unless it shall appear to such Lord Chancellor or Judge that the party so committed is detained upon a legal process, order, or warrant, out of some Court having jurisdiction of criminal matters, or by some warrant signed and sealed with the hand and seal of a judge of the Court of Queen's Bench, Common Pleas, or Exchequer, or some justice or justices of the peace, for such matters or offences for which by law the prisoner is not bailable [as of right, in which cases he shall be remanded.] (*o*)

(*o*) 31 Car. II. c. 2, s. 3. By section 5, any officer neglecting or refusing to make the returns directed by the two next preceding Articles of this Chapter, or to bring the body of the prisoner or prisoners according to the command of the writ of *habeas corpus* within the respective times mentioned in those Articles, or refusing, upon demand made by the prisoner or person in his behalf, to deliver, or within the space of six hours after demand, not delivering to the persons so demanding, a true copy of the warrant or warrants of commitment and detainer of such prisoner, is liable, for the first offence, to forfeit to the prisoner or party grieved 100*l.*, and for the second offence 200*l.*, recoverable by action of debt, &c., and is made incapable to hold or execute his office.

The words between brackets appear to be necessary, since a person *may* now be bailed for any offence.

ART. 14.

Motion to discharge prisoner.

Upon the writ being returned, and the prisoner brought up, his counsel is first to be heard in support of the prisoner's right to be discharged or bailed, then the counsel for the Crown against such right, and afterwards the counsel for the prisoner in reply. (*p*)

(*p*) See R. *v.* Baines, 9 Ad. & Ell. 213.

ART. 15.

The Court, Lord Chancellor, or Judge before whom a prisoner is brought may remand him to the custody from which he came, and order him to be brought up again, and so on from time to time, or may, during a reasonable time, bail him from day to day, until such Court, Lord Chancellor, or judge have determined in what manner to deal with him. (*q*)

(*q*) Bac. Abrid. *Hab. Corp.* B. 13; R. *v.* Bethel, 5 Mod. 19; Ventris, 346.

ART. 16.

Requisites of return.

The return to such writ of *habeas corpus* as is mentioned in Article 1 of this Section, must, where the prisoner is brought up, contain a copy of all the causes of his detainer. (*r*)

(*r*) Corner's P. 115.

ART. 17.

Where the writ is not obeyed by bringing up the body of the person named in such writ, the return must state distinctly and unequivocally the reasons why it is not and cannot be obeyed. (*s*)

(*s*) Corner's P. 115.

ART. 18.

Where the writ is not obeyed by bringing up the body of the person named in such writ, it is not sufficient that the return states that such person has not been, and is not detained, by the officer to whom the writ is directed; but it must show distinctly and unequivocally that such person was not at any time before, or at the time of the service of the writ, or afterwards, and is not in the custody, power, or control of the officer making the return. (*t*)

(*t*) R. *v.* Winton, 5 T. R. 89; Warman's Case, 2 W. Bl., 1204; Corner's P. 115.

ART. 19.

It is a sufficient return to the writ that the party is in custody under the sentence of a Court having competent jurisdiction to inquire of the offence, and pass such sentence, without setting forth the particular circumstances necessary to warrant such a sentence. (*u*)

(*u*) R. *v.* Suddis, 1 East, 303.

ART. 20.

So also it is a sufficient return to such writ of *habeas corpus* as in Article 1 of this Section is mentioned, that the person named in such writ is in custody under a commitment by a Court of Record or by one of the Houses of Parliament for a contempt, and need not specify the particulars of such contempt. (*x*)

(*x*) Crosby's Case, 3 Wils. 199; Stockdale *v.* Hansard, 11 Ad. & Ell. 273.

ART. 21.

The facts stated in the return to the writ shall be taken to be true until they are impeached. (*y*)

(*y*) Corner's P. 116; 9 Ad. & Ell. 731.

ART. 22.

The return to the writ may be confessed and avoided by filing a suggestion of matters not contradictory of the return. (*z*)

(*z*) Corner's P. 117; R. *v.* Rodgers, 3 D. & R. 607; R. *v.* Douglas, 12 L. J. R. N. S., 2 B. 49. It seems that the return cannot be traversed although an action lies for a false return, *ib.*

ART. 23.

Return amendable.

The return to the writ is amendable by leave of the Court, Lord Chancellor, or Judge, even after it has been filed, or a new one may by such leave be substituted. (*a*)

(*a*) Corner's P. 116; 9 A. & E. 731.

ART. 24.

Where arrest irregular, if reasonable ground of charge against prisoner, he will be remanded.

Although an arrest be irregular or a warrant of commitment be defective or informal, if, from the depositions returned, the Court or judge before whom the prisoner is brought, see that an offence has been committed, and that there is reason-

able ground of charge against a prisoner, such Court or judge will not discharge, but remand him, or bind him over by recognizance to answer the charge. (*b*)

(*b*) R. *v.* Marks, 3 East, 157; R. *v.* Homer, Cald. 295; *ex parte* Krans. 1 B. and C. 258; Corner's P. 109; Chitty's C. L. 132; *ex parte* Scott, 9 B. & C. 446; Rex *v.* Bethel, 5 Mod. 19. Qy. If necessary that it should disclose the day and cause of the prisoner's caption, see Bushel's case, Vaugh. 137; Bac. Abrid. *Hab. Corp.* B. 9.

ART. 25.

Mode of proceeding where party unable to defray the expenses of being brought to Westminster.

Where a prisoner who has been committed to the county gaol on a charge of felony ought to be bailed, but is unable to defray the expenses of being brought to Westminster for that purpose, the Court or judge to whom application on his behalf is made for a writ of *habeas corpus* to bring him up, will at their or his discretion, grant a rule to show cause why he should not be bailed by a justice of the peace in the country, and will grant a writ of *certiorari* directed to the person before whom the depositions against the prisoner were taken, to return the same. (*c*)

(*c*) R. *v.* Jones, 1 B. and Ald. 207.

ART. 26.

Bail.

The rules relating to the number, sufficiency, and amount of bail contained in Section 5 of Chapter I. of this Act shall apply, so far as the same are applicable, to bail upon a writ of *habeas corpus*.

ART. 27.

Persons neglecting two terms to pray a *habeas* shall have none in vacation time.

If any person shall have wilfully neglected by the space of two whole terms after his imprisonment to pray a *habeas corpus* for his enlargement, such person so wilfully neglecting shall not have any *habeas corpus* to be granted in vacation time, in pursuance of Article 4 of this Section. (*d*)

(*d*) 31 Car. II. c. 2, s. 4.

ART. 28.

Person set at liberty on *habeas corpus*, not to be again imprisoned for same offence.

No person who shall be delivered or set at large upon any *habeas corpus* shall be again imprisoned or committed for the same offence, by any person or persons whomsoever other than by the legal order and process of such Court wherein he shall be bound by recognizance to appear, or other Court having jurisdiction of the cause. (*e*)

(*e*) 31 Car. II. c. 2, s. 6, in part. By the same section it is enacted, that "if any other person or persons shall knowingly, contrary to that Act, recommit or imprison, or knowingly procure or cause to be recommitted or imprisoned, for the same offence or pretended offence, any person or persons delivered or set at large as aforesaid, or be knowingly aiding or assisting therein, then he or they shall forfeit to the prisoner or party grieved the sum of 500*l.*, any colourable pretence or variation in the warrant or warrants of commitment notwithstanding, to be recovered as aforesaid," that is, by action of debt, &c.

ART. 29.

No removal after assizes proclaimed.

To the intent that no person may avoid his trial at the assizes or general gaol delivery, by procuring his removal before the assizes at such time as he cannot be brought back to receive his trial there, no person after the assize is proclaimed for that county where the prisoner is detained shall be removed from the common gaol upon any such writ of *habeas corpus* obtained as in Article 4 of this Section is mentioned; but, upon any such *habeas corpus*, shall be brought before the judge of assize in open Court, who is thereupon to do what to justice shall appertain. (*f*)

(*f*) 31 Car. II. c. 2, s. 18.

ART. 30.

Provided, nevertheless, that after the assizes are ended, any person detained may have his *habeas corpus* according to the intention of the preceding Articles of this Section. (*g*)

(*g*) 31 Car. II. c. 2, s. 19.

ART. 31.

Persons in custody in one prison, how removable to another.

If any person, being a subject of this realm, shall be committed to any prison or in custody of any officer, for any criminal or supposed criminal matter, such person shall not be removed from such prison or custody into the custody of any other officer, unless it be by *habeas corpus* or some other legal writ, or where the prisoner is delivered to the constable or other inferior officer to carry such prisoner to some common gaol, or where any person is sent, by order of any judge of assize or justice of the peace, to any common workhouse or house of correction, or where the prisoner is removed from one prison or place to another within the same county, in order to his trial or discharge in due course of law, or in case of sudden fire or infection, or other necessity. (*h*)

(*h*) 31 Car. II. c. 2, s. 9, in part. By the same section it is enacted, that "if any person or persons shall, after such commitment aforesaid, make out and sign, or countersign, any warrant or

warrants for such removal aforesaid contrary to that Act, as well he that makes and signs or countersigns such warrant or warrants as the officer or officers that obey or execute the same, shall suffer and incur the pains and forfeitures in that Act before mentioned, both for the first and second offence respectively, to be recovered in manner aforesaid by the party grieved," that is, by action of debt, &c.

ART. 32.

If it shall appear to any Court of oyer and terminer or general gaol delivery for the county of any city or town corporate, that any indictment found by any grand jury of the county of such city or town corporate, is fit and proper to be tried by a jury of any next adjoining county, such Court is hereby directed to cause every defendant in such indictment mentioned to be removed by writ of *habeas corpus* to the gaol of such next adjoining county, if such defendant be in the prison of such city or town corporate. (*i*)

(*i*) 38 Geo. III. c. 52, s. 3, in part.

ART. 33.

So any of the judges of the Court of Queen's Bench, or any of the justices of oyer and terminer or general gaol delivery for any county next adjoining to the county of any city or town corporate in which of any offence shall be committed or charged to be committed, may, on the application of any prosecutor, ten days next before the holding of any sessions of oyer and terminer or general gaol delivery for such next adjoining county, by a proper writ of *habeas corpus*, which they are hereby empowered and authorized to issue, cause any person who may be in the custody of any sheriff, or of the keeper of any gaol or prison, charged with any such offence, to be removed into the custody of the sheriff of such next adjoining county, in order that such person may be tried therein for such offence. (*k*)

(*k*) 38 Geo. III. c. 52, s. 4, in part.

ART. 34.

The rules contained in Articles 24 and 25 of Section 1 of Chapter II. of this Act shall apply as well to the last two preceding Articles as to Article 23 of such first-mentioned Section.

ART. 35.

Any judge of one of Her Majesty's superior Courts at Westminster acting under any commission of oyer and terminer and gaol delivery for any county may if necessary by writ or writs of *habeas corpus*, cause any person or persons who may be in the custody of any gaol or prison, charged with any offence which the justices of the peace for such county, or any riding, division, or liberty, or the recorder of any borough situated within such county, have not or has not jurisdiction to try by virtue of Article 16 of Section 1 of Chapter VII. of this Act, to be removed into the custody of the keeper of the common gaol of the county, so that the same offence may be inquired of and determined according to law, under the authority of such commission. (*l*)

(*l*) 5 and 6 Vict. c. 38, s. 2, in part.

ART. 36.

Prisoner may be removed by *habeas corpus* from one jurisdiction to another.

Besides the cases mentioned in Articles 32, 33 and 35 of this Section, whensoever a prisoner in custody in one jurisdiction is to be tried in another, he is to be removed by a writ of *habeas corpus* adapted to the circumstances. (*m*)

(*m*) Corner's P. 121 ; 1 Hale's P. C. 580.

ART. 37.

Any judge of the Court of Queen's Bench, Common Pleas, or Exchequer, or any justice of oyer and terminer or gaol delivery, being such judge, may at his discretion award a writ of *habeas corpus* for bringing any prisoner detained in any gaol or prison before any of such courts, or any sitting of nisi prius, or before any other court of record in England, to be there examined as a witness, and to testify the truth before such courts, or any grand jury in any cause or matter criminal whatsoever, depending or to be inquired into or determined in any of such courts. (*n*)

(*n*) 44 Geo. III. c. 102, s. 1.

ART. 38.

If it appear on the face of the commitment that a prisoner is to be tried in a jurisdiction different from that in which he is in custody, the writ may be obtained on a copy of the commitment, verified by affidavit ; otherwise an affidavit of the fact of his being so to be tried is necessary in addition. (*o*)

(*o*) Corner's P. 121.

ART. 39. Chap. XI. Sec. 2.

Where prisoner brought by *habeas corpus* on a criminal charge before a magistrate.

If a prisoner being brought up by writ of *habeas corpus* for examination before a justice of the peace or for trial on a criminal charge, the charge be dismissed, or the prisoner be acquitted, he is to be taken back to the place of custody whence he came; but if he be committed for trial or convicted and sentenced to imprisonment, the criminal detainer supersedes any civil one, and he is to be committed to the gaol of the place where he is to be tried or imprisoned, charged with such causes of detainer as may appear by the return to the writ of *habeas corpus*, as well as his commitment for trial or on sentence. (*p*)

(*k*) Corner's, P. 120.

SECTION 3. Chap. XI. Sec. 3.

*Costs of Prosecutions.**

ART. 1.

Courts may order payment of expenses of prosecutions in all cases of felony.

THE Court before which any person shall be prosecuted or tried for any felony, or for negligent homicide, (*a*) or any offence against the person specified in Section 7 of Chapter XV. of the Act of Crimes and Punishments (*b*), or for theft, embezzlement, or obtaining anything by any false pretence, or for any riot, assault with intent to commit felony, attempt to commit felony, assault upon a peace-officer in the execution of his duty, or upon any person acting in aid of such officer, neglect or breach of such duty as a peace-officer, assault committed in pursuance of any conspiracy to raise the rate of wages, or for open lewdness or indecency in any public thoroughfare or other place of public resort, or in the view thereof, (*c*) is hereby authorized, at the request of the prosecutor, whether he shall be under recognizance to prosecute or not, (*d*) or of any other person who shall appear on recognizance or subpœna to prosecute or give evidence against any person accused of any such offence, to order payment unto the prosecutor of the costs and expenses which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution of such sums of money as to the Court shall seem reasonable and sufficient to reimburse such prosecutor and witnesses for the expenses they shall have severally incurred in attending before the examining justice or justices of the peace and the grand jury, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein; and although no bill of indictment be preferred, it shall still be lawful for the Court, where any person shall in the opinion of the Court have attended the Court in good faith, in obedience to any such recognizance or subpœna, to order payment unto such person of such sum of money as to the Court shall seem reasonable and sufficient to reimburse such person for the expenses which he shall have incurred in good faith by reason of attending before the examining justice or

Allowance to persons attending on recognizance, where no bill is preferred.

(*a*) These words are necessary in consequence of our new divisions of homicide, according to which negligent homicide is only a misdemeanor.

(*b*) We think that the power to give costs should exist in the case of all offences against the person, and the reference to the above Section of the Act of Crimes and Punishments renders unnecessary any direct mention of the offence of endeavouring to conceal the birth of a child by secreting its dead body, in which case the Court was empowered by the 7 Wm. IV. and 1 Vic. c. 44, s. 1, to order costs.

(*c*) The words of the 7 Geo. IV. c. 64, s. 23, are "of wilful and indecent exposure of the person," and that has been held to mean *public* exposure (8 Ad. and Ellis. 589); but upon principle it has appeared to us that the power to grant costs should be extended to all the cases mentioned in Article 2 of Chapter XI. of the Act of Crimes and Punishments. The 7 Geo. IV. c. 64, s. 28, also specifies "any misdemeanor for receiving any stolen property, knowing the same to have been stolen, "and wilful and corrupt perjury or subornation of perjury;" but it is unnecessary to specify these, as they will now fall under our division of *felonies*, being transportable offences. The language of the 22nd Section of the 7 Geo. IV. c. 64, which provides for the allowance of costs in cases of felony is different from that of the 23rd section, which relates to costs in case of the misdemeanors therein specified. It has been held that the former allows costs to a prosecutor, although not under recognizance to prosecute; but it would appear from the mode in which the latter Section is worded, that he must be under recognizance to entitle him to his costs in cases of misdemeanor. We are not aware of any sufficient reason for this distinction. We also recommend the omission of so much of the 23rd Section as provides that in cases of misdemeanors the power of ordering the payment of expenses and compensation shall not extend to the attendance before the examining magistrate; as it may sometimes occur that there is as much reason for allowing them in case of the misdemeanors above specified as of felonies, and the granting them at all is discretionary only, and the power is not likely to be abused. Under these circumstances, we have embodied so much of the 23rd Section as we propose to retain with the provisions of the 22nd Section in the above Article.

(*d*) R. *v.* Butterwick, 2 M. and R. 196. See also R. *v.* Sheering, 7 Car. and P. 640; and R. *v.* Jeyes, 3 Ad. and Ell. 410.

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* Several provisions concerning costs which are of a special nature are set forth under the proper heads.

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justices, and by reason of such recognizance or subpœna, and also to compensate such person for trouble and loss of time; and the amount of the expenses of attending before the examining justice or justices, and the compensation for trouble and loss of time therein, shall be ascertained by the certificate of such justice or justices, granted before the trial or attendance in Court, if such justice or justices shall think fit to grant the same; and the amount of all the other expenses and compensation shall be ascertained by the proper officer of the Court, subject nevertheless to the regulations to be established in the manner hereinafter in this Section mentioned. (*e*)

(*e*) See 7 Geo. IV. c. 64, s. 22 and 23.

ART. 2.

Order for payment to be made out by clerk of assize, &c. and paid by county treasurer.

Every order for payment to any prosecutor or other person, as mentioned in the last preceding Article, shall be forthwith made out and delivered by the proper officer of the Court unto such prosecutor or other person, upon being paid for the same the sum of 1*s.* for the prosecutor, and 6*d.* for each other person, and no more; and except in the cases hereinafter in this Section provided for, shall be made upon the treasurer of the county, riding, or division in which the offence shall have been committed, or shall be supposed to have been committed, who is hereby required, upon sight of every such order, forthwith to pay to the person named therein, or to any one duly authorized to receive the same on his behalf, the money in such order mentioned, and shall be allowed the same in his accounts. (*f*)

(*f*) 7 Geo. IV. c. 64, s. 24.

ART. 3.

How expenses shall be paid in places not contributing to the county rate.

All sums directed to be paid by virtue of Article 1 of this Section in respect of the offences therein specified, committed or supposed to have been committed in liberties, franchises, cities, towns, or places which do not contribute to the payment of any county rate, shall be paid out of the rate in the nature of a county rate, or out of any fund applicable to similar purposes where there is such a rate or fund, by the treasurer or other officer having the collection or disbusement of such rate or fund; and where there is no such rate or fund in such liberties, franchises, cities, towns, or places, shall be paid out of the rate or fund for the relief of the poor of the parish, township, district, or precinct therein where the offence was committed or supposed to have been committed, by the overseers or other officers having the collection or disbursement of such last-mentioned rate or fund; and the order of Court shall in every such case be directed to such treasurer, overseers, or other officers respectively, instead of the treasurer of the county, riding, or division, as the case may require. (*g*)

(*g*) 7 Geo. IV. c. 64, s. 25.

ART. 4.

How in boroughs having separate Courts of Quarter Sessions.

All sums directed to be paid by virtue of Article 1 of this Section in respect of the offences therein specified, committed or supposed to have been committed in any borough in which a separate Court of Quarter Sessions of the peace shall be holden, shall be paid out of the borough fund of such borough; and the order of Court shall in every such case be directed to the treasurer of such borough, instead of the treasurer of the county. (*h*)

(*h*) 5 and 6 Wm. IV. c. 76, s. 113.

ART. 5.

Quarter Sessions to make regulations as to costs and expenses.

It shall be lawful for the justices of the peace of any county, riding, or division, or of any liberty, franchise, city, town, or place chargeable with costs and expenses under the provisions hereinbefore in this Section contained, in quarter sessions assembled [and for the recorder of any borough in which a separate Court of Quarter Sessions of the peace shall be holden, at the quarter sessions], (*i*) to establish and from time to time to alter such regulations as to the rate of any costs and expenses thereafter to be allowed by virtue of Article 1 of this Section, as to them or him shall seem just and reasonable; which regulations having received the approbation and signature of one justice of gaol delivery for the county wherein any such regulations shall have been established, shall be binding on all persons whatsoever. (*k*)

(*i*) The words between brackets appear to be necessary. The 5 and 6 Wm. IV. c. 76, s. 105, enacts that borough quarter sessions shall have cognizance of all crimes, offences, and *matters* whatsoever cognizable by any Court of quarter sessions of the peace for counties in England, and that the Recorder shall have power to do all things necessary for exercising such jurisdiction as fully as any such last-mentioned Court.

(*k*) 7 Geo. IV. c. 64, s. 26.

ART. 6.

Payment of expenses in prosecutions in Court of Admiralty.

It shall be lawful for the judge of the High Court of Admiralty, in the case of any such offence as is mentioned in Article 1 of this Section, committed upon the high seas, or other place within the jurisdiction of the Admiralty of England, or for any Court of oyer and terminer or gaol delivery, where any such offence is tried before any such last-mentioned Court, to order the assistant to the counsel for the affairs of the Admiralty and Navy to pay such costs, expenses, and compensation to prosecutors and witnesses in like manner as other courts may order the treasurer of the county to pay the same; and such assistant is hereby required, upon sight of every such order, forthwith to pay to the person named therein, or to any one duly authorized to receive the same on his behalf, the money in such order mentioned, and shall be allowed the same in his accounts. (*l*)

(*l*) 7 Geo. IV. c. 64, s. 27; 7 and 8 Vic. c. 2, s. 1, in part.

ART. 7.

Courts may order compensation to those who have been active in the apprehension of certain offenders.

Where any person shall appear to the Court of oyer and terminer, gaol delivery, or superior criminal Court of a county palatine, to have been active in or towards the apprehension of any person charged with murder, or any attempt to commit murder, (*m*) or with maliciously causing or attempting to cause any grievous bodily harm to any other person, or with administering or using anything to procure the miscarriage of any woman, or with rape, or with unlawfully and carnally knowing and abusing any girl under the age of 12 years, or with burglary or sacrilege, (*n*) or with stealing in any dwelling-house, shop, warehouse, or counting-house, the same being attended with any one of the aggravations mentioned in Article 47 of Section 1 of Chapter XVIII. of the Act of Crimes and Punishments, or with robbery, or with arson, or with horse-stealing, bullock-stealing, or sheep-stealing, or with being accessory to any of such offences, or with receiving or having in his possession or keeping any stolen property knowing the same to have been stolen, every such Court is hereby authorized in any of such cases to order the sheriff of the county in which the offence shall have been committed, to pay to any person who shall appear to the Court to have been active in or towards the apprehension of any person charged with any of such offences such sum or sums of money as to the Court shall seem reasonable and sufficient to compensate such person for his expenses, exertions, and loss of time [or for his courageous conduct or laudable vigilance, although he shall have incurred no actual expense or loss of time (*o*)] in or towards such apprehension; and where any person shall appear to any Court of sessions of the peace to have been active in or towards the apprehension of any party charged with receiving or having in his possession or keeping stolen property knowing the same to have been stolen, such Court shall have power to order compensation to such person in the same manner as the other Courts hereinbefore in this Article mentioned: Provided that nothing in this Article contained shall prevent any of such Courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expenses, and compensation as Courts are by any Article of this Section empowered to allow to prosecutors and witnesses respectively. (*p*)

Proviso.

(*m*) Darkin's case, 2 Lew. C. C. 163.

(*n*) It was decided by Robinson's case, 1 Lew. 129, 130, that the 7 Geo. IV. c. 64, s. 28, does not apply to sacrilege; but we think it ought.

(*o*) The words between brackets have been added in consequence of the decisions in R. *v.* Womersly, 2 Lew. 162; R. *v.* Blake, 7 C. and P. 166; R. *v.* Barnes, 7 C. and P. 166.

(*p*) 7 Geo. IV. c. 64, s. 28. We have altered the description of the offences contained in the 7 Geo. IV. c. 64, s. 28, in conformity with the Act of Crimes and Punishments.

ART. 8.

Such orders to be paid by the sheriff, who may obtain repayment on application to Treasury.

Every order for payment to any person in respect of such apprehension as in the last preceding Article is mentioned shall be forthwith made out and delivered by the proper officer of the Court unto such person, upon being paid for the same the sum of 5*s.* and no more; and the sheriff for the county for the time being is hereby required, upon sight of such order, forthwith to pay to such person, or to any one duly authorized on his behalf, the money in such order mentioned; and every such sheriff may immediately apply for repayment of the same to the Commissioners of Her Majesty's Treasury, who upon inspecting such order, together with the acquittance of the person entitled to receive the money thereon, shall forthwith order repayment to the sheriff of the money so by him paid, without any fee or reward whatsoever. (*q*)

(*q*) 7 Geo. IV. c. 64, s. 29.

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ART. 9.

If any man is killed in attempting to take certain offenders, Court may order compensations to his family.

If any man shall happen to be killed in endeavouring to apprehend any person who shall be charged with any of the offences in Article 7 of this Section mentioned, it shall be lawful for the Court before whom such person shall be tried to order the sheriff of the county to pay to the widow of the man so killed, in case he shall have been married, or to his child or children in case his wife shall be dead, or to his father or mother in case he shall have left neither wife nor child, such sum of money as to the Court in its discretion shall seem meet; and the order for payment of such money shall be made out and delivered by the proper officer of the Court unto the party entitled to receive the same, or unto some one on his behalf, to be named in such order by the direction of the Court; and every such order shall be paid by and repaid to the sheriff in the manner in the last preceding Article mentioned. (*r*)

(*r*) 7 Geo. IV. c. 64, s. 30.

ART. 10.

The order for payment of the expenses of the prosecutor and witnesses within the meaning of Article 1 of this section may be made, although the trial be postponed. (*s*)

(*s*) Bolam's case, Roscoe's Cr. Ev. 226; Flannery's case, 1 Lew. 133. Such an order has, however, been refused. R. *v.* Hunter, 3 C. and P. 591. This seems to be a matter wholly for the discretion of the judge.

ART. 11.

A party bound over by a Court of quarter sessions to prosecute any person accused of any of the offences specified in Article 1 of this Section, at the assizes or any other superior criminal Court, is entitled to his expenses within the meaning of that Article. (*t*)

(*t*) R. *v.* Paine, 7 C. and P. 135.

ART. 12.

A party who appears before any Court, either as prosecutor or on recognizance or subpœna, to give evidence against any person accused of any of the offences specified in Article 1 of this Section, is entitled to his expenses within the meaning of that Article, if a bill of indictment be preferred against such person, although such person shall have been previously discharged by mistake. (*u*)

(*u*) R. *v.* Robey, 5 C. and P. 552.

ART. 13.

Costs where indictment removed by *certiorari*.

The rule contained in Article 1 of this Section shall apply where the indictment is removed by writ of *certiorari*, and that whether it be removed by the prosecutor or the accused. (*v*)

(*v*) Doubts have been entertained on this point, and perhaps the balance of authority is against the power, see R. *v.* Richards, 8 B. & C. 420; R. *v.* Kelsey, 1 Dowl. P. C. 481. Per Littledale, J. in R. *v.* The Treasurer of Exeter, 5 M. & Ry. 167. In.——8 Ad. & Ell. 589, Lord Denman, C.J., however, allowed costs after a removal by a *certiorari*, and the order for their payment was made a rule of Court, but upon a rule to show cause why that rule should not be discharged, the Court decided the case on another ground; Mr. Baron Parke also allowed costs at York in a similar case. It appears to us that the rule as laid down in the above Article is the more reasonable.

ART. 14.

Costs on account of casualties.

The necessary increase in the expenses of any prosecutor or witness in consequence of any casualty befalling him in the course of carrying on the prosecution, is allowable under the provisions of Article 1 of this Section. (*w*)

(*w*) As in case of the confinement of a woman, 1 Lew. 133; or of insanity, *in re* Mallinson, 1 Lew. 132.

ART. 15.

Of attendance at inquests.

On a trial for murder or extenuated or negligent homicide, the costs of the attendance of witnesses at the inquest, or of a surgeon for examining the body, by order of the coroner, are not allowable under the provisions of Article 1 of this Section. (*x*)

(*x*) R. *v.* Rees, 5 C. and P. 302; R. *v.* Taylor, 5 C. and P. 301. But see the 6 and Will. IV. c. 89, and 1 Vic. c. 68, which empowers the coroner to advance the reasonable expenses of holding inquests, not exceeding the sum set forth in the Schedule to the latter Act, such expenses to be repaid to the coroner out of the county rates or borough fund.

Art. 16.

Where prosecutor, after removing indictment, gives notice of trial, and does not countermand it in due time.

A prosecutor who, after removing an indictment into the Court of Queen's Bench, by writ of *certiorari*, gives notice of trial and does not countermand it in due time, is liable to costs to the defendant. (*y*)

(*y*) R. *v.* Bartrum, 8 East, 269; R. *v.* Walton, 6 C. and P. 229.

Art. 17.

In case of new trials.

The Court of Queen's Bench is governed by the same principles as to the granting costs in case of a new trial in criminal as in civil cases. (*z*)

(*z*) R. *v.* Ford, 1 N. and M. 776.

Art. 18.

The prosecutor, after conviction of the defendant upon an indictment for a misdemeanor pending in the Court of Queen's Bench, or upon a criminal information, is entitled, under a writ of Privy Seal, to a third of the fine, if a fine be imposed, towards his costs, if they amount to so much, and if they be not sufficient, it is competent to him to memorialize the Lords of the Treasury to be allowed, at their discretion, a further part of such fine. (*a*)

(*a*) Corner's P. 126–131; 177.

Art. 19.

Costs where persons tried in county for offences committed in the county of a city or town corporate.

The justices of oyer and terminer or general gaol delivery, at any session thereof holden for any county, may order all expenses whatsoever incurred by such county, in relation to any person who shall be tried in such county, or removed thither for trial, for any offence committed or charged to have been committed within in the county of any city or town corporate, as well in maintaining and supporting such person, and carrying the sentence into execution, as in any other respect, to be repaid to the treasurer of such county, or other person acting as treasurer of such county, or who shall have actually paid such expenses, by the same person or persons, and in the same manner as the same would have been payable, if such offender or supposed offender had remained in the county of such city or town corporate, and had been tried in the Court of oyer and terminer, or general gaol delivery of the county of such city or town corporate, and as if the sentence, with respect to such offender, had been carried into execution within the county of such city or town corporate. (*b*)

(*b*) 38 Geo. III. c. 52, s. 8; 51 Geo. III. c. 100, s. 2.

Art. 20.

Bridges.

The Court before whom any indictment shall be [preferred] (*c*) for not repairing bridges, or the roads at the end thereof, repaired at the expense of the county, may award costs to the prosecutor, to be paid by the person or persons indicted, if it shall appear to such Court that the defence made to such indictment was frivolous or may award costs to the person indicted, to be paid by the prosecutor, if it shall appear to such Court that such prosecution was vexatious. (*d*)

(*c*) We have substituted the word "preferred" for "tried," in order that the language of this and the next two Articles may be uniform, and because the former word has been held (see R. *v.* Upper Papworth (2 East 413), and R. *v.* Pembridge (3 Q. B. R. 901) to have a larger meaning than the latter, and to have been adopted by the Legislature on that account.

(*d*) 13 Geo. III. c. 78, s. 65, incorporated in the 43 Geo. III. c. 59, s. 2.

Art. 21.

Highways.

The costs of prosecutions directed under the provisions of Article 49 of Section 5 of Chapter I. of this Act, shall be directed by the judge of assize before whom the indictment is [preferred], (*e*) or by the justices at the next general quarter sessions of the peace for the county, riding, division, or place wherein such highway as in that Article is mentioned shall be, to be paid out of the rate made and levied in pursuance of the Act passed in the Session of Parliament holden in the 5th and 6th years of the reign of King William IV., in the same Article referred to, in the parish in which such highway shall be situate. (*f*)

(*e*) We have substituted this word for the word "tried" for the reasons stated in note (*c*) to the last preceding Article.

(*f*) 5 & 6 Wm. IV. c. 50, s. 95, in part.

ART. 22.

It shall be lawful for the Court before whom any indictment shall be preferred for not repairing highways, to award costs to the prosecutor, to be paid by the person indicted, if it shall appear to such Court that the defence made to such indictment was frivolous or vexatious. (*g*)

(*g*) 5 & 6 Will. IV. c. 50, s. 98.

ART. 23.

The awarding of costs under the provisions of Article 21 of this Section is imperative upon the judge or justices therein mentioned. (*h*)

(*h*) R. *v.* Yorkhill, 9, C. & P. 218; R. *v.* Pembridge, 3 Q. B. R. 901, per Lord Denman, L.C.J.

ART. 24.

The provisions of Articles 20, 21, and 22 of this Section shall apply where the indictment is removed by writ of *certiorari*, (*i*) but not to cases where the road indicted is found not to be a public highway; (*k*) and the costs intended by those Articles include costs incurred previously to such removal. (*l*)

(*i*) Corner's P. 160; R. *v.* Preston, 7 Dowl. P. C. 593; R. *v.* Pembridge, 3 Q. B. R. 901. A different construction was once put on the now repealed statute, 13 Geo. III., c. 78, s. 65, see R. *v.* Chadderton, 5 T. R. 272.

(*k*) R. *v.* Heanor, 1 Car. Ham. and Allen's New Sessions Cases, 466.

(*l*) 7 Dowl. P. C. 593.

ART. 25.

The provisions of Article 20 only apply to cases tried in the ordinary course.

Provided that where any such indictment as in Article 20 of this Section is mentioned has been removed by writ of *certiorari*, and the party indicted convicted at the assizes, and a new trial afterwards granted, part of the terms of granting which are that the prosecutor's costs of both trials shall abide the event of the new trial, the Court shall not have power to award costs to the person indicted under the provisions of that Article. (*m*)

(*m*) R. *v.* Salwick, 2 Barn. & Ald. 136.

ART. 26.

The payment of costs, awarded under the provisions of Article 20, 21, or 22, of this Section, by the judge at *nisi prius*, where the indictment has been removed by writ of *certiorari*, may be enforced by process of attachment from the Court of Queen's Bench, according to the course and practice of that Court. (*n*)

(*n*) R. *v.* Pembridge, 3 Q. B. R. 901; Corner's P. 159.

ART. 27.

What a sufficient award of writs under Articles 20 and 22.

The certificate of the judge at *nisi prius* before whom the indictment was tried that the defence was frivolous or vexatious, or that the prosecution was vexatious, is a sufficient award of costs within the meaning of Articles 20 and 22 of this Section respectively. (*o*)

(*o*) So held under the stat. 13 Geo. III., c. 78. See R. *v.* Clifton, 6 T. R. 344; R. *v.* St. John, Margate, 6 M. & S. 130.

ART. 28.

The rule contained in the last preceding Article applies, notwithstanding a rule *nisi* shall have been granted for arresting the judgment. (*p*)

(*p*) R. *v.* St. John, Margate, 6 M & S. 130; Corner's P. 159.

ART. 29.

Nuisances by steam-engines.

It shall be lawful for the Court by which judgment ought to be pronounced in case of conviction, on any indictment for a nuisance from the improper construction or negligent use of furnaces employed in the working of engines by steam, to award such costs as shall be deemed proper and reasonable to the prosecutor, to be paid by the party or parties convicted, such award to be made either before or at the time of pronouncing final judgment as to the Court may seem fit. (*q*)

(*q*) 1 & 2 Geo. IV. c. 41, s. 1.

ART. 30.

The rule contained in Article 39 of Section 1 of Chapter IX. of this Act shall apply as well to the last preceding Article as to Article 38 of such Section.

ART. 31.

Personal Libels.

In the case of any indictment or information by a private prosecutor for the publication of any personal libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by such defendant, by reason of such indictment or information; and upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs so to be recovered by the defendant or prosecutor respectively to be taxed by the proper officer of the Court before which such indictment or information is tried. (*r*)

(*r*) 6 & 7 Vict. c. 96, s. 8.

ART. 32.

In case any person against whom any criminal information shall be exhibited by Her Majesty's Coroner or Master of the Crown Office, in the Court of Queen's Bench, under the provisions of Article 6 of Section 4 of Chap. II. of this Act, shall appear thereunto, and plead to issue, and the prosecutor of such information shall not, at his own proper costs and charges, within one whole year next after issue joined therein, procure the same to be tried, or if upon such trial a verdict pass for the defendant, or in case such prosecutor procure a *nolle prosequi* to be entered, then in any of those cases the Court of Queen's Bench is authorized [and bound] (*s*) to award to such defendant his costs, unless the judge before whom such information shall be tried shall, at the trial of such information, in open court, certify upon record that there was a reasonable cause for exhibiting such information; and in case such prosecutor shall not, within three months next after such costs taxed and demand made thereof, pay the same to such defendant, then such defendant shall have the benefit of the recognizance mentioned in Article 2 of Section 2 of Chap. III. of this Act, to compel such prosecutor thereto. (*t*)

(*s*) 2 Stra. 1131; Com. Dig. "Information" A. 2.
(*t*) See 4 and 5 Will. and Mary, c. 18, s. 2: see Chitty's C. L. 482.

ART. 33.

The defendant is not entitled under the last preceding Article to costs where the information is tried at bar. (*u*)

(*u*) See 1 Chitty's C. L. 872, and the authorities there referred to.

ART. 34.

The prosecutor is not liable, under the provisions of Article 32 of this Section, beyond the amount of 20*l.*, the penalty of the recognizance referred to in that Article. (*v*)

(*v*) 2 T. R. 145; 3 Burr. 1819.

ART. 35.

Offences by bankrupts.

Where the Court authorized to act in the prosecution of any fiat in bankruptcy shall direct the institution and carrying on of a prosecution of the bankrupt for any of the offences, and in the manner mentioned in Article 18 of Section 1 of Chapter II. of this Act, such Court may order the costs and expenses to be incurred in such prosecution to be paid out of the estate and effects of such bankrupt. (*w*)

(*w*) 5 & 6 Vic. c. 122, s. 36, in part.

SECTION 4.

Forfeited Recognizances.

ART. 1.

Forfeited recognizance, proceedings on.

WHERE a recognizance is forfeited for breach of condition by reason of failure to appear, plead, try, or otherwise, the proceedings for the estreat of the recognizance and recovery of the amount forfeited shall be by order of the Court, after requiring the principal to perform the condition of such recognizance, by *scire facias* or otherwise, according to the course of the Court and the ordinary rules of law, applicable to forfeited recognizances.

ART. 2.

Provided that it shall be competent to the Court of Queen's Bench, pending the proceedings by *scire facias*, to order a stay of proceedings on terms or for other just cause.

ART. 3.

Mode of proceeding at Courts of oyer and terminer, gaol delivery, quarter sessions, &c.

Provided also that, in every case where any person bound by recognizance for his appearance, or for whose appearance any other person shall be so bound, to prosecute or give evidence in any case of felony or misdemeanor, shall therein make default, the officer of the Court by whom the estreats are made out shall prepare a list in writing, specifying the name of every person so making default and the nature of the offence in respect of which every such person or his surety was so bound, together with the residence, trade, profession, or calling of every such person and surety, and shall in such list distinguish the principals from the sureties; and shall state the cause, if known, why each such person has not appeared, and whether by reason of the non-appearance of such person the ends of justice have been defeated or delayed; and every such officer shall, before any such recognizance shall be estreated, lay such list, if at a Court of oyer and terminer or gaol delivery in any county besides Middlesex and London, or at one of the superior Courts of the counties Palatine, before one of the justices of those Courts respectively; if at a Court wherein a Recorder or other Corporate Officer is the Judge or one of the Judges, before such Recorder or other Corporate Officer; and if at a Session of the Peace, before the Chairman or two other Justices of the Peace who shall have attended such Court, who are respectively required to examine such list, and to make such order touching the estreating or putting in process of any such recognizance as shall appear to them respectively to be just; and it shall not be lawful for any officer of any such Court to estreat or put in process any such recognizance without the written order of the Justice, Recorder, Corporate Officer, Chairman, or Justices of the Peace before whom respectively such list shall have been laid. (*a*)

(*a*) 7 Geo. IV. c. 74, s. 31, in part.

ART. 4.

Accused continues liable after amount of recognizance levied or paid.

Although the recognizance be forfeited and the amount levied or paid, the accused continues to be amenable to answer for the crime in respect of which the recognizance was taken. (*b*)

(*b*) Chitty's Burn's Jus., tit. "Bail."

ART. 5.

What not a sufficient compliance with the condition of a recognizance for his appearance, &c.

A recognizance conditioned for the appearance of a defendant in the Court of Queen's Bench, on the first day of Term, to answer an information against him, and not to depart till he shall be discharged by the Court, is not satisfied unless, after personal notice, he be forthcoming to answer any other information which shall be exhibited against him before he receives his discharge. (*c*)

(*c*) Haw. P. C., b. 2, c. 15, s. 84; Bac. Ab. "Bail, L;" Chitty's Burn's Just., tit. "Bail."

ART. 6.

Provided that after such defendant as in the last preceding Article is mentioned has pleaded to the information, for his appearance to answer which his sureties were bound, the recognizance shall not be forfeited by his not appearing in Court on the first day of every ensuing Term previously to receiving his discharge. (*d*)

(*d*) Chitty's Burn's Just., tit. "Bail," citing Hawk. P. C., b. 2, c. 15, s. 84.

ART. 7.

If the defendant enter into the usual recognizance upon an indictment found in the Queen's Bench to appear and plead in the ensuing Term, and to try the cause at the sittings after that Term, and personally to appear upon the return of the postea if convicted, the recognizance is forfeited by omitting to make up the record and give notice of trial, although the prosecutor give notice of trial and make up the record. (*e*)

(*e*) Rex *v.* Clarke, 5 B. and A. 728.

ART. 8.

In the case mentioned in the last preceding Article no notice of estreating the recognizance is necessary. (*f*)

(*f*) Rex *v.* Clarke, 5 B. and A. 728.

ART. 9.

A party bound by recognizance to appear at the assizes or sessions to answer a charge, or give evidence, is not exonerated from his recognizance if he depart the Court without having his appearance entered, although no bill be found or preferred. (*g*)

(*g*) Talf. Dick. Quarter Sessions, 125.

ART. 10.

Recognizance when person indicted in adjoining county for offence committed in a city or town corporate.

Every recognizance which shall be entered into for the prosecution of any person for any offence committed, or charged to be committed, within the county of any city or town corporate, or within any liberty or franchise, and every recognizance for the appearance as well of witnesses to give evidence upon any bill of indictment to be preferred for any such offence, as for the appearance of any person to answer the Queen, for or concerning the same, shall be forfeited, if the prosecutor shall, ten days previously to the holding of the next Court of oyer and terminer or gaol delivery in the next adjoining or other county, give notice to the person bound in such recognizance to give evidence upon such bill of indictment, or to answer the Queen, of the intention to prefer such indictment in the next adjoining or other county, and the party bound in such recognizance shall not appear, prosecute, or give, or be ready to give evidence at such Court; but if the person bound in such recognizance shall, after such notice, appear at such Court of the next adjoining or other county, prosecute, give, or be ready to give evidence on such indictment before the grand jury, and on the trial thereof, then such recognizance shall be discharged in such and the like manner as if the person bound in such recognizance had complied with the terms thereof. (*h*)

(*h*) 38 Geo. III. c. 52, s. 5.

ART. 11.

Provided that, in case the person who shall enter into any such recognizance as in the last preceding Article is mentioned cannot be found, and such notice as therein mentioned be left at the last place of abode of such person ten days previously to the holding of the next Court of oyer and terminer or gaol delivery in the next adjoining or other county, as therein last mentioned, the same shall be as good and effectual as if the same were left with such person; and that no such recognizance shall be estreated, or returned into the Court of Exchequer, until the next following session of oyer and terminer or general gaol delivery to be holden for such next adjoining county, in order that such recognizance may be discharged, in case the person who shall have entered into the same shall show to such Court of oyer and terminer or general gaol delivery sufficient cause for discharging the same. (*i*)

(*i*) 38 Geo. III. c. 52, s. 6.

ART. 12.

The return and levying of forfeited recognizances.

Provisions for the return and levying of forfeited recognizances are contained in the two Acts passed in the 3rd and 4th years respectively of the reign of King George the Fourth, referred to in Article 24 of Chapter X. of this Act, and in the Act passed in the Session of Parliament holden in the 3rd and 4th years of the reign of King William the Fourth, referred to in Article 23 of the same Chapter. (*k*)

(*k*) See the Note to Article 23 of Chap. X. of this Act.

CHAPTER XII.

Explanations, Definitions of Terms, and Forms.

SECTION I.

Explanations and Definition of Terms.

Art. 1.

Chap. XII. Sec. 1.

The only crimes to which this Act is applicable are those contained in the Act of Crimes and Punishments.

Art. 2.

Forms.

The Roman capitals between brackets used in any Article of this Act refer to the forms of instruments contained in Section 2 of this Chapter; and the particular form referred to in any case or any form of the same or like effect may be used in framing the instrument intended by the Article from which reference is so made.

Art. 3.

Every Judge at the Courts at Westminster may transact such business as may now be transacted by a single Judge, although the Courts have no common jurisdiction therein.

Every Judge of the Court of Queen's Bench, Common Pleas, or Exchequer, shall have equal jurisdiction, power, and authority to transact out of Court such business as may, according to the course and practice of the Court, be so transacted by a single Judge, relating to the granting writs of *certiorari* or *habeas corpus*, or to the admitting prisoners on criminal charges to bail, or relating to any other matter or thing usually transacted out of Court, although such Courts have no common jurisdiction therein, in like manner as if the Judge transacting such business had been a Judge of the Court to which the same by law belongs. (*a*)

(*a*) 1 and 2 Vict. c. 45, s. 1, in part.

Art. 4.

Solicitor-General may do what Attorney-General may do, during vacancy in that office.

Whatsoever is by any Article of this Act authorized to be done by the Attorney-General, may, during vacancy in that office, be done by the Solicitor-General.

Art. 5.

Justices of the Peace can only act within their jurisdictions.

Whatsoever is by any Article of this Act authorized to be done by or before any Justice of the Peace for any county, riding, division, liberty, city, borough or place, must, unless it be otherwise specially provided, be done within the limits of such county, riding, division, liberty, city, borough or place respectively.

Art. 6.

Non omittas Clause.

It shall not be necessary in any writ or warrant in this Act mentioned, to include the clause of *non omittas propter aliquam libertatem*; every such writ, although such clause be omitted, shall and may be executed in any liberty as though it had contained that clause. (*b*)

(*b*) See Haw. P. C. b. 2, c. 27, ss. 5, 6.

Art. 7.

Oath.

Wheresoever the taking of an oath or the being sworn is prescribed, required, or permitted by this Act, those terms shall be deemed to extend to, and to be satisfied by, the making an affirmation in all cases where the making such affirmation is by law made equivalent to the taking of an oath, or is substituted for an oath.

Art. 8.

Not necessary to state that jurors made affirmation.

It shall not be necessary in any caption, indictment, or other legal proceeding, or in stating or setting forth any such proceeding, to specify that any particular persons who acted as jurors made affirmation instead of oath, but it may be stated that they served as jurymen, or were sworn, in the same manner as if no Act had been passed for enabling persons to serve as jurymen without oath, and as though they had been actually sworn. (*c*)

(*c*) 6 & 7 Vict. c. 85, s. 2.

ART. 9.

Mark.

Wheresoever the signature of any party is required by this Act, the mark of any person who cannot write shall be deemed to be sufficient, provided a memorandum be made upon the instrument at the time, stating the name of the person making such mark.

ART. 10.

All provisions concerning Justices of the Peace, Coroners for Counties or Sheriffs, shall, so far as they are applicable, be applied to justices of the peace, coroners, sheriffs, and those severally appointed to execute like duties, by whatsoever name such officers may be described or known, in ridings and other divisions or districts of limited local jurisdiction not being counties.

ART. 11.

Definition of following terms:

The terms following, wheresoever occurring throughout this Act, shall be understood as hereinafter defined, unless it be otherwise specially provided, or there be something in the subject or context repugnant thereto: that is to say,

"Lord Chancellor."

The term "Lord Chancellor" shall be deemed to include the Lord Keeper or Lords Commissioners for the time being of the Great Seal of Great Britain;

"Charge."

The term "charge" shall be deemed to include an indirect as well as a direct charge of any offence;

"Peace Officer."

All Articles of this Act in which the term "peace officer" is used, are to be read as if the words "constable, headborough, tithingman, borseholder, or other peace officer," had been therein used instead of that term.

ART. 12.

Throughout this Act, in mentioning any prosecutor, defendant, or accused or suspected person, or any person affected or intended to be affected by any offence, or any witness, words are used importing the singular number or the masculine gender only, yet they shall be understood to include several persons as well as one person, and females as well as males, and the inhabitants of counties, parishes, townships, and other districts and places whatsoever, and bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction.

SECTION 2.

*Forms of certain Instruments referred to in this Act.**

(A.)

Information and Complaint for an indictable Offence.

} The information and complaint of *C. D.* of [*yeoman*],
to wit. } taken this day of in the year of our Lord
184 before the undersigned, [*one*] of Her Majesty's justices of the peace in and for the said [*county*] of who saith that [*&c., stating the offence*].

Sworn before [*me*], the day and year first above mentioned, at

J. S.

(B.)

Warrant to apprehend a Person charged with an indictable Offence.

To the Constable of and to all other peace officers in the said [*county*] of

Whereas *A. B.* of [*labourer*] hath this day been charged upon oath before the undersigned, [*one*] of Her Majesty's justices of the peace in and for the said county of for that he on at did [*&c., stating shortly the offence, and referring to the Article of the Act of Crimes and Punishments by which it is made punishable*]: These are therefore to command you, in Her Majesty's name, forthwith to apprehend the said *A. B.*, and to bring him

* With the exception of (M), we have only inserted forms in those cases where they have been enacted by Act of Parliament.

before [*me*], or some other of Her Majesty's justices of the peace in and for the said [*county*], to answer unto the said charge, and to be further dealt with according to law.

Given under my hand and seal, this day of in the year of our Lord at in the [*county*] aforesaid.

J. S. (L.S.)

(C.)

Summons to a Person charged with an indictable Offence.

To *A. B.* of [*labourer*].

Whereas you have this day been charged before the undersigned, [*one*] of Her Majesty's justices of the peace in and for the said [*county*] of for that you on at [*&c., stating shortly the offence, and referring to the Article of the Act of Crimes and Punishments by which it is made punishable*]: These are therefore to command you, in Her Majesty's name, to be and appear before me on at o'clock in the forenoon at or before such other justice or justices of the peace for the same [*county*] as may then be there, to answer to the said charge, and to be further dealt with according to law. Herein fail not.

Given under my hand and seal, this day of in the year of our Lord at in the county aforesaid.

J. S. (L.S.)

(D.)

Warrant where the Summons is disobeyed.

To the Constable of and to all other Peace Officers in the said [*county*] of

Whereas on the last past *A. B.* of [*labourer*] was charged before the undersigned, [*one*] of Her Majesty's justices of the peace in and for the said [*county*] of for that [*&c., as in the summons*]: And whereas [*I*] then issued [*my*] summons to the said *A. B.*, commanding him, in Her Majesty's name, to be and appear before [*me*] on at o'clock in the forenoon at or before such other justice or justices of the peace for the same [*county*] as might then be there, to answer to the said charge, and to be further dealt with according to law: And whereas the said *A. B.* hath neglected to be or appear at the time and place appointed in and by the said summons, although it hath now been proved to me upon oath that the said summons was duly served upon the said *A. B.*: These are therefore to command you, in Her Majesty's name, forthwith to apprehend the said *A. B.*, and to bring him before me, or some other of Her Majesty's justices of the peace in and for the said [*county*], to answer to the said charge, and to be further dealt with according to law.

Given under my hand and seal, this day of in the year of our Lord at in the [*county*] aforesaid.

J. S. (L.S.)

(E.)

Warrant to apprehend a Person charged with an indictable Offence committed on the High Seas or Abroad, or partly on the High Seas or Abroad and partly within England.

For offences committed on the high seas the warrant may be the same as in ordinary cases, but describing the offence to have been committed "on the high seas, out of the body of any county of this realm, and within the jurisdiction of the Admiralty of England.

For offences committed abroad for which the parties may be indicted in this country the warrant also may be the same as in ordinary cases, but describing the offence to have been committed "on land out of the United Kingdom, to wit, at in

the kingdom of ," *or* "at in the East Indies," *or* "at in the island of in the West Indies," *or as the case may be.*

For offences committed partly on the high seas or abroad, and partly within England, for which the parties may be indicted in this country, the warrant may be in either of the forms last mentioned.

(F.)

Indorsement in backing a Warrant.

to wit. } Whereas proof upon oath hath this day been made before me, one of Her Majesty's justices of the peace for the said [*county*] of that the name of *J. S.* to the warrant within subscribed, is of the handwriting of the justice of the peace within mentioned; I do therefore hereby authorize *W. T.*, who bringeth to me this warrant, and all other persons to whom this warrant was originally directed, or by whom it may lawfully be executed, and also all constables and other peace officers of the said [*county*] of to execute the same within the said last-mentioned [*county*],* and to bring the said *A. B.*, if apprehended within the same [*county*], before me, or before some other justice or justices of the peace of the same county, to be dealt with according to law.

Given under my hand, this day of , 184 .

J. S.

* *The words following this asterisk are to be used only where the justice backing the warrant shall think fit, and may be omitted in backing English warrants in Ireland, Scotland, &c., or in backing Irish or Scotch warrants, &c., in England.*

(G. 1.)

Summons of a Witness.

To *E. F.* of [*labourer*].

Whereas information hath been laid before the undersigned, [*one*] of Her Majesty's justices of the peace in and for the said [*county*] of that *A. B.* [*&c., as in the summons or warrant against the accused*], and it hath been made to appear to me upon [*oath*] that you are likely to give material evidence for the [*prosecution*]: These are therefore to require you to be and to appear before me on next at o'clock in the forenoon at or before such other justice or justices of the peace for the same county as may then be there, to testify what you shall know concerning the said charge so made against the said *A. B.* as aforesaid. Herein fail not.

Given under my hand and seal, this day of in the year of our Lord at in the [*county*] aforesaid.

J. S. (L.S.)

(G. 2.)

Warrant where a Witness has not obeyed a Summons.

To the Constable of and to all other Peace Officers in said [*county*] of .

Whereas information having been laid before the undersigned, [*one*] of Her Majesty's justices of the peace in and for the said [*county*] of that *A. B.* [*&c., as in the summons*]; and it having been made to appear to [*me*] upon oath that *E. F.* of [*labourer*] was likely to give material evidence for the prosecution, I did duly issue my summons to the said *E. F.*, requiring him to be and appear before me on at or before such other justice or justices of the peace for the same county as might

then be there, to testify what he should know respecting the said charge so made against the said *A. B.* as aforesaid: And whereas proof hath this day been made before me upon oath of such summons having been duly served upon the said *E. F.*: And whereas the said *E. F.* hath neglected to appear at the time and place appointed by the said summons, and no just excuse has been offered for such neglect: These are therefore to command you to bring and have the said *E. F.* before me on at o'clock in the forenoon at or before such other justice or justices of the peace for the same [*county*] as may then be there, to testify what he shall know concerning the said charge so made against the said *A. B.* as aforesaid.

Given under my hand and seal, this day of in the year of our Lord at in the [*county*] aforesaid.

J. S. (L.S.)

(G. 3.)

Warrant for a Witness in the first instance.

To the Constable of and to all other Peace Officers in the said [*county*] of .

Whereas information hath been laid before the undersigned, [*one*] of Her Majesty's justices of the peace in and for the said [*county*] of that [*&c., as in summons*]; and it having been made to appear to [*me*] upon oath that *E. F.* of [*labourer*] is likely to give material evidence for the prosecution, and that it is probable that the said *E. F.* will not attend to give evidence without being compelled so to do: These are therefore to command you to bring and have the said *E. F.* before me on at o'clock in the forenoon at or before such other justice or justices of the peace for the same [*county*] as may then be there, to testify what he shall know concerning the said charge so made against the said *A. B.* as aforesaid.

Given under my hand and seal, this day of in the year of our Lord at in the [*county*] aforesaid.

J. S. (L.S.)

(G. 4.)

Warrant of Commitment of a Witness for refusing to be sworn or to give Evidence.

To the Constable of and to the Keeper of the [*House of Correction*] at in the said [*county*] of .

Whereas *A. B.* was lately charged before the undersigned, [*one*] of Her Majesty's Justices of the Peace in and for the said [*county*] of for that [*&c., as in the summons*]; and it having been made to appear to [*me*] upon oath that *E. F.* of was likely to give material evidence for the prosecution, I duly issued my summons to the said *E. F.*, requiring him to be and appear before me on at or before such other justice or justices of the peace as should then be there, to testify what he should know concerning the said charge so made against the said *A. B.* as aforesaid; and the said *E. F.* now appearing before me [*or* being brought before me by virtue of a warrant in that behalf, to testify as aforesaid], and being required to make oath or affirmation as a witness in that behalf, hath now refused so to do [*or* being duly sworn as a witness, doth now refuse to answer certain questions concerning the premises which are here put to him], without offering any just excuse for such his refusal: These are therefore to command you, the said constable, to take the said *E. F.*, and him safely to convey to the [*house of correction*] at in the county aforesaid, and there deliver him to the said keeper thereof, together with this precept; and I do hereby command you, the said keeper of the said [*house of correction*] to receive the said *E. F.* into your custody in the said [*house of correction*], and him there safely keep for the space of days for his

said contempt, unless he shall in the mean time consent to be examined and to answer concerning the premises; and for your so doing this shall be your sufficient warrant.

Given under my hand and seal, this day of in the year of our Lord at in the [*county*] aforesaid.

J. S. (L.S.)

(H.)

Depositions of Witnesses.

}The examination of *C. D.* of [*farmer*] and *E. F.*
to wit. } of [*labourer*], taken on [*oath*] this day of in the year of our Lord at in the [*county*] aforesaid, before the undersigned [*one*] of Her Majesty's justices of the peace for the said [*county*], in the presence and hearing of *A. B.*, who is charged this day before [*me*], for that he the said *A. B.* on at [*&c., describing the offence as in a warrant of commitment*].

This deponent *C. D.* on his [*oath*] saith as follows [*&c., stating the deposition of the witness as nearly as possible in the words he uses. When his deposition is complete, let him sign it*].

And this deponent *E. F.*, upon his oath, saith as follows [*&c.*]

The above depositions of *C. D.* and *E. F.* were taken and [*sworn*] before me at on the day and year first above-mentioned.

J. S.

(I.)

Statement of the Accused.

: *A. B.* stands charged before the undersigned, [*one*] of Her Majesty's justices of the peace in and for the [*county*] aforesaid, this day of in the year of our Lord for that he the said *A. B.* on at [*&c., as in the caption of the depositions*]; and the said charge being read to the said *A. B.*, and the witnesses for the prosecution, *C. D.* and *E. F.*, being severally examined in his presence, the said *A. B.* is now addressed by me as follows: "Having heard the evidence, do you wish to say anything in answer to the charge? you are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;" whereupon the said *A. B.* saith as follows:—

[*Here state whatever the prisoner may say, and in his very words, as nearly as possible. Get him to sign it if he will.*]

A. B.

Taken before me at the day and year first above-mentioned.

J. S.

(K. 1.)

Recognizance to prosecute or give Evidence.

: Be it remembered that on the day of in the year of our Lord *C. D.* of in the township of in the said county, *farmer*, [*or C. D.* of *No.* 2, street in the parish of in the borough of *surgeon*, of which said house he is tenant,] personally came before me, one of Her Majesty's justices of the peace for the said county, and acknowledged himself to owe to our Sovereign Lady the Queen the sum of of good and lawful money of Great Britain, to be made and levied of his goods and chattels, lands and tenements, to the use of our said Lady the Queen, her heirs and successors, if he the said *C. D.* shall fail in the condition indorsed.

Taken and acknowledged, the day and year first above mentioned, at before me.

J. S.

Chap. XII. Sec. 2.

Condition to prosecute.

The condition of the within-written recognizance is such, that whereas one *A. B.* was this day charged before me *J. S.*, justice of the peace within mentioned, for that [*&c., as in the caption of the depositions*], it therefore he the said *C.D.* shall appear at the next Court of oyer and terminer, or general gaol delivery [*or* at the next Court of general quarter sessions of the peace] to be holden in and for the [*county*] of * and there prefer or cause to be preferred a bill of indictment for the offence aforesaid against the said *A. B.*, and there also duly prosecute such indictment, then the said recognizance to be void, or else to stand in full force and virtue.

Condition to prosecute and give Evidence.

Same as the last Form to the asterisk, and then thus:*—" and there prefer or cause to be preferred a bill of indictment against the said *A. B.* for the offence aforesaid, and duly prosecute such indictment, and give evidence thereon as well to the jurors who shall then inquire of the said offence, as also to them who shall pass upon the trial of the said *A. B.*, then the said recognizance to be void, or else to stand in full force and virtue."

Condition to give Evidence.

Same as the last Form but one to the asterisk, and then thus:*—" and there give such evidence as he knoweth upon a bill of indictment to be then and there preferred against the said *A. B.* for the offence aforesaid, as well to the jurors who shall there inquire of the said offence as also to the jurors who shall pass upon the trial of the said *A. B.* if the said bill shall be found a true bill, then the said recognizance to be void, or else to stand in full force and virtue."

(K. 2.)

Notice of the said Recognizance to be given to the Prosecutor and his Witnesses.

to wit. { Take notice, that you *C. D.* of are bound in the sum of to appear at the next Court of [*General Quarter Sessions of the Peace*] in and for the county of to be holden at in the said county, and then and there [*prosecute and*] give evidence against *A. B.*; and unless you then appear there, and [*prosecute and*] give evdence accordingly, the recognizance entered into by you will be forthwith levied on you. Dated this day of 184 .

J. S.

(L. 1.)

Commitment of Witness for refusing to enter into the Recognizance.

To the Constable of and to the Keeper of the [*House of Correction*] at in the said [*county*] of .

Whereas *A. B.* was lately charged before the undersigned [*one*] of Her Majesty's justices of the peace in and for the said [*county*] of for that [*&c., as in the summons to the witness*], and it having been made to appear to [*me*] upon oath that *E. F.* of was likely to give material evidence for the prosecution, [*I*] duly issued [my summons to the said *E. F.*, requiring him to be and appear] before [*me*] on at or before such other justice or justices of the peace as should then be there, to testify what he should know concerning the said charge so made against the said *A. B.* as aforesaid; and the said *E. F.* now appearing before [*me*], [*or* being brought before [*me*] by virtue of a warrant in that behalf, to testify as aforesaid,] hath been now examined by [*me*] touching the premises, but being by [*me*] required to enter

into a recognizance conditioned to give evidence against the said *A. B.* hath now refused so to do: These are therefore to command you the said constable to take the said *E. F.*, and him safely to convey to the [*house of correction*] at in the [*county*] aforesaid, and there deliver him to the said keeper thereof, together with this precept; and I do hereby command you, the said keeper of the said [*house of correction*], to receive the said *E. F.* into your custody in the said [*house of correction*], there to imprison and safely keep him until after the trial of the said *A. B.* for the offence aforesaid, unless in the mean time such *E. F.* shall duly enter into such recognizance as aforesaid in the sum of pounds, before some one justice of the peace for the said [*county*], conditioned in the usual form to appear at the next Court of [oyer and terminer or general gaol delivery, *or* general quarter sessions of the peace,] to be holden in and for the [*county*] of and there to give evidence before the grand jury upon any bill of indictment which may then and there be preferred against the said *A. B.* for the offence aforesaid, and also to give evidence upon the trial of the said *A. B.* for the said offence, if a true bill should be found against him for the same.

Given under my hand and seal this day of , in the year of our Lord at in the [*county*] aforesaid.

J. S. (L.S.)

(L. 2.)

Subsequent order to discharge the Witness.

To the Keeper of the [*House of Correction*] at in the [*county*] of .

Whereas by [*my*] order dated the day of [*instant*], reciting that *A. B.* was lately before them, charged before [*me*] for a certain offence therein mentioned, and that *E. F.* having appeared before [*me*], and being examined as a witness for the prosecution in that behalf, refused to enter into a recognizance to give evidence against the said *A. B.*, and [*I*] therefore thereby committed the said *E. F.* to your custody, and required you safely to keep him until after the trial of the said *A. B.* for the offence aforesaid, unless in the mean time he should enter into such recognizance as aforesaid: And whereas for want of sufficient evidence against the said *A. B.*, the said *A. B.* has not been committed or holden to bail for the said offence, but on the contrary thereof, has been since discharged, and it is therefore not necessary that the said *E. F.* should be detained longer in your custody: These are therefore to order and direct you, the said keeper, to discharge the said *E. F.* out of your custody as to the said commitment, and suffer him to go at large.

Given under [*my*] hand and seal, this day of in the year of our Lord at in the [*county*] aforesaid.

J. S. (L.S.)

(M.)

Order for attendance of Infants and Married Women to give evidence.

To an infant [or married woman].

Whereas *A. B.* was this day charged before the undersigned [*one*] of Her Majesty's justices of the peace in and for the [*county*] of for that [*&c., as in the caption of the depositions*]; you, therefore, are hereby required to appear at the next Court of oyer and terminer [or at the next Court of quarter sessions of the peace] to be holden in and for the [*county*] of and there give such evidence as you know upon a bill of indictment to be then and there preferred against the said *A. B.* for the offence aforesaid, as well to the jurors who shall there inquire of the said offence as also to the jurors who shall pass upon the trial of the said *A. B.*, if the said Bill shall be found a true Bill. In default of your appearance as above mentioned you will be liable to a penalty of *l.*

Given under my hand and seal, this day of , in the year of our Lord at in the [*county*] aforesaid.

J. S. (L.S.)

(N. 1.)

Warrant remanding a Prisoner.

To the Constable of and to the [*Keeper of the House of Correction*] at in the said [*county*] of .

Whereas *A. B.* was this day charged before the undersigned [*one*] of Her Majesty's justices of the peace in and for the said [*county*] of for that [*&c., as in the warrant to apprehend*]; and it appears to me to be necessary to remand the said *A. B.*: These are therefore to command you the said constable, in Her Majesty's name, forthwith to convey the said *A. B.* to the [*house of correction*] at in the said [*county*], and there to deliver him to the keeper thereof, together with this precept; and [*I*] hereby command you the said keeper to receive the said *A. B.* into your custody in the said house of correction, and there safely keep him until the day of instant, when [*I*] hereby command you to have him at at o'clock in the forenoon of the same day before [*me*], or before such other justice or justices of the peace for the said [*county*] as may then be there, to answer further to the said charge, and to be further dealt with according to law, unless you shall be otherwise ordered in the mean time.

Given under my hand and seal, this day of , in the year of our Lord at in the [*county*] aforesaid.

J. S. (L.S.)

(N. 2.)

Recognizance of Bail instead of Remand, on an Adjournment of Examination.

: Be it remembered, that on the day of in he year of our Lord *A. B.* of [*labourer*], *L. M.* of [*grocer*], and *N. O.* of [*butcher*], personally came before me, one of Her Majesty's justices of the peace for the said [*county*], and severally acknowledged themselves to owe to our Lady the Queen the several sums following; that is to say, the said *A. B.* the sum of and the said *L. M.* and *N. O.* the sum of each of good and lawful money of Great Britain, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Lady the Queen, Her heirs and successors, if he the said *A. B.* fail in the condition indorsed.

Taken and acknowledged, the day and year first above mentioned, at before me,

J. S.

Condition.

The condition of the within-written recognizance is such, that whereas the within-bounden *A. B.* was this day [*or* on last past] charged before me, for that [*&c., as in the warrant*]: And whereas the examination of the witnesses for the prosecution in this behalf is adjourned until the day of instant; if therefore the said *A. B.* shall appear before me on the said day of instant at o'clock in the forenoon, or before such other justice or justices of the peace for the said [*county*] as may then be there, to answer [*further*] to the said charge, and to be further dealt with according to law, then the said recognizance to be void, or else to stand in full force and virtue.

(N. 3.)

Notice of such Recognizance to be given to the Accused and his Sureties.

: Take notice, that you *A. B.* of are bound in the sum of and your sureties *L. M.* and *N. O.* in the sum of each, that you *A. B.* appear before me *J. S.*, one of Her Majesty's justices of the peace for the [*county*] of on the day of instant at o'clock in the forenoon, at or before such other justice or justices of the peace for the same [*county*] as may then be there, to answer further to the charge made against you by *C. D.*, and to be further dealt with according to law; and unless you *A. B.* personally appear accordingly, the recognizances entered into by yourself and sureties will be forthwith levied on you and them. Dated this day of 184 .

J. S.

(N. 4.)

Certificate of Non-appearance to be endorsed on the Recognizance.

I hereby certify, that the said *A. B.* hath not appeared at the time and place in the above condition mentioned, but therein hath made default, by reason whereof the within-written recognizance is forfeited.

J. S.

(O. 1.)

Warrant to convey the Accused before a Justice of the County, &c., in which the Offence was committed.

To *W. T.*, Constable of and to all other Peace Officers in the said [*county*] of

Whereas *A. B.* of [*labourer*], hath this day been charged before the undersigned, [*one*] of Her Majesty's justices of the peace in and for the said county of for that [*&c., as in the warrant to apprehend*]: And whereas [*I*] have taken the deposition of *C. D.*, a witness examined by [*me*] in this behalf; but inasmuch as [*I*] am informed that the principal witnesses to prove the said offence against the said *A. B.* reside in the [*county*] of *C.*, where the said offence is alleged to have been committed, these are therefore to command you the said constable, in Her Majesty's name, forthwith to take and convey the said *A. B.* to the said [*county*] of *C.*, and there carry him before some justice or justices of the peace in and for that [*county*], and near unto the [*parish of D.*], where the offence is alleged to have been committed, to answer further to the said charge before him or them, and to be further dealt with according to law; and [*I*] hereby further command you, the said constable, to deliver to the said justice or justices the information in this behalf, and also the said deposition of *C. D.* now given into your possession for that purpose, together with this precept.

Given under my hand and seal, this day of in the year of our Lord at in the [*county*] aforesaid.

J. S. (L.S.)

(O. 2.)

Order for Payment of the Constable's Expenses.

To *R. W.*, Esquire, treasurer of the said county of *C.*

Whereas *W. T.*, constable of in the county of *A.*, hath by virtue of and in obedience to a certain warrant of *J. S.*, esquire, [*one*] of Her Majesty's justices of the peace in and for the said county of *A.*, taken and conveyed one *A. B.*, charged before the said *J. S.* with having [*&c., stating shortly the offence*], from in the said county of *A.* to in the said county of *C.*, a distance of miles, and produced the said *A. B.* before me *S.P.*, one of Her Majesty's justices of the peace in and for the said county of *C.*, and delivered him into the custody of by [*my*] direction, to answer to the said charge, and further to be dealt with according to law: And whereas the said *W. T.* hath also delivered to [*me*] the said warrant, together with the information in that behalf, and also the deposition of *C. D.* in the said warrant mentioned, and hath proved to [*me*] upon oath the handwriting of the said *J. S.* subscribed to the same: and whereas [*I*] have ascertained that the sum which ought to be paid to the said *W. T.* for conveying the said *A. B.* from the said county of *A.* to the said county of *C.*, and taking him before [*me*], is the sum of and that the reasonable expenses of the said *W. T.* in returning will amount to the further sum of making together the sum of : These are therefore to order you, as such treasurer of the said county of *C.*, to pay unto the said *W. T.* the said sum of according to the form of the statute in such case made and provided, for which payment this order shall be your sufficient voucher and authority.

Given under my hand, this day of 184 .

J. P.

(P. 1.)

Recognizance of Bail.

Be it remembered, that on the day of in the year of our Lord *A. B.* of [*labourer*], *L. M.* of [*grocer*], and *N. O.* of [*butcher*], personally came before [*us*] the undersigned, two of Her Majesty's justices of the peace for the said [*county*], and severally acknowledged themselves to owe to our Lady the Queen the several sums following; (that is to say), the said *A. B.* the sum of and the said *L. M.* and *N. O.* the sum of each, of good and lawful money of Great Britain, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Lady the Queen, her heirs and successors, if he the said *A. B.* fail in the condition indorsed.

Taken and acknowledged, the day and year first above mentioned, at before us,

J. S.
J.N.

Condition in ordinary Cases.

The condition of the within-written recognizance is such, That whereas the said *A. B.* was this day charged before [*us*], the justices within mentioned, for that [*&c., as in the warrant*]; if therefore the said *A. B.* will appear at the next Court of oyer and terminer and general gaol delivery [*or* Court of general quarter sessions of the peace] to be holden in and for the county of and there surrender himself into the custody of the keeper of the [*common gaol*] there, and plead to such indictment as may be found against him by the grand jury, for or in respect of the charge aforesaid, and take his trial upon the same, and not depart the said Court without leave, then the said recognizance to be void, or else to stand in full force and virtue.

Condition where the Defendant is entitled to a Traverse.

The condition of the within-written recognizance is such, That whereas the said *A. B.* was this day charged before [*me*], the justice within mentioned, for that [*&c., as in the warrant or summons*]; if therefore the said *A. B.* will appear at the next Court of general quarter sessions of the peace [*or* Court of oyer and terminer and general gaol delivery] to be holden in and for the county of and there plead to such indictment as may be found against him by the grand jury for or in respect of the charge aforesaid, and shall afterwards at the then next Court of general quarter sessions of the peace [*or* Court of oyer and terminer and general gaol delivery] surrender himself into the custody of the keeper of the [*house of correction*] there, and take his trial upon the said indictment, and not depart the said Court without leave, then the said recognizance to be void, or else to stand in full force and virtue.

(P. 2.)

Notice of the said Recognizance to be given to the Accused and his Bail.

Take notice, that you *A. B.* of are bound in the sum of and your [*sureties L. M. and N. O.*] in the sum of each, that you *A. B.* appear, *&c.* [*as in the condition of the recognizance*], and not depart the said Court without leave; and unless you the said *A. B.* personally appear and plead, and take your trial accordingly, the recognizance entered into by you and your sureties shall be forthwith levied on you and them.

Dated this day of 184 .

J. S.

(P. 3.)

Certificate of Consent to Bail by the Committing Justice indorsed on the Commitment.

I hereby certify, that I consent to the within-named *A. B.* being bailed by recognizance, himself in and [*two*] sureties in each.

J. S.

(P. 4.)

The like, on a separate Paper.

Whereas *A. B.* was on the committed by me to the [*house of correction*] at charged with [*&c., naming the offence shortly*]:

I hereby certify, that I consent to the said *A. B.* being bailed by recognizance, himself in and [*two*] sureties in each. Dated the day of 184 .

J. S.

(P. 5.)

Warrant of Deliverance on Bail being given for a Prisoner already committed.

To the Keeper of the [*house of correction*] at in the said [*county*] of

Whereas *A. B.*, late of [*labourer*], hath before [*us, two*] of Her Majesty's justices of the peace in and for the said county, entered into his own recognizance, and found sufficient sureties for his appearance at the next Court of oyer and terminer and general gaol delivery [*or* Court of general quarter sessions of the peace] to be holden in and for the county of to answer our Sovereign Lady the Queen, for that [*&c., as in the commitment*], for which he was taken and committed to your said [*house of correction*]: These are therefore to command you, in Her said Majesty's name, that if the said *A. B.* do remain in your custody in the said [*house of correction*] for the said cause, and for no other, you shall forthwith suffer him to go at large.

Given under our hands and seals, this day of in the year of our Lord at in the [*county*] aforesaid.

J. S. (L.S.)
J. N. (L.S.)

(Q. 1.)

Warrant of Commitment.

To the Constable of and to the Keeper of the [*house of correction*] at in the said [*county*] of

Whereas *A. B.* was this day charged before me, *J. S.*, one of Her Majesty's justices of the peace in and for the said [*county*] of on the oath of *C. D.* of *farmer*, and others, for that [*&c., stating shortly the offence, and referring to the Article of the Act of Crimes and Punishments by which it is made punishable*]: These are therefore to command you, the said constable of , to take the said *A. B.*, and him safely to convey to the [*house of correction*] at aforesaid, and there to deliver him to the keeper thereof, together with this precept; and I do hereby command you the said keeper of the said [*house of correction*] to receive the said *A. B.* into your custody in the said [*house of correction*], and there safely keep him until he shall be thence delivered by due course of law.

Given under my hand and seal, this day of in the year of our Lord at in the [*county*] aforesaid.

J. S. (L.S.)

(Q. 2.)

Gaoler's Receipt to the Constable for the Prisoner, and Justice's Order thereon for Payment of the Constable's Expenses in executing the Commitment.

I hereby certify, that I have received from *W. T.*, constable of , the body of *A. B.*, together with a warrant under the hand and seal of *J. S.*, Esquire, one of Her Majesty's justices of the peace for the [*county*] of ; and that the said *A. B.* was [sober, *or as the case may be*], at the time he was so delivered into my custody.

P. K.,
Keeper of the House of Correction
[*or common gaol*] at .

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Constable's expenses :—	£.	s.	d.
For conveying the above *A. B.* from to [*by railway*] at per mile			
For conveying him to and from the railway station .			
For subsistence of prisoner whilst in custody after commitment days, at per day . .			
For his lodging nights, at per night .			
Constable days, at per day . . .			
[*One*] assistant [*if necessary*] days, at per day			
Total . . . . £			

To *R. W.*, Esquire, treasurer of the said [*county*] of

Whereas *W. T.*, constable of in the county of hath produced unto me, *J. P.*, one of Her Majesty's justices of the peace in and for the said county of (wherein the offence hereinafter mentioned is alleged to have been committed), the above receipt of *P. K.*, keeper of the [*house of correction*] at : And whereas, in pursuance of the statute in such case made and provided, I have ascertained that the sum which ought to be paid to the said *W. T.* for conveying the said *A. B.* from in the said county of to the said [*house of correction*] is and that the reasonable expenses of the said *W. T.* in returning will amount to the further sum of making together the sum of : These are therefore to order you, as such treasurer of the said county of to pay unto the said *W. T.* the said sum of according to the form of the statute in such case made and provided, for which payment this order shall be your sufficient voucher and authority.

Given under my hand, this day of 184 .

J. P.

Received the day of 184 of the treasurer of the [*county*] of the sum of being the amount of the above order.

£ .

(R.)

Certificate of Indictment being found.

I hereby certify, that at [a Court of oyer and terminer and general gaol delivery, *or* a Court of general quarter sessions of the peace], holden in and for the [*county*] of at in the said [*county*], on a bill of indictment was found by the grand jury against *A. B.*, therein described as *A. B.* late of [*labourer*], for that he [*&c., stating shortly the offence, and referring to the Article of the Act of Crimes and Punishments by which it is made punishable*], and that the said *A. B.* hath not appeared or pleaded to the said indictment.

Dated this day of 184 .

J. D.

Clerk of the indictments on the circuit,

or

Clerk of the peace of and for the said [*county*].

(S.)

Warrant to apprehend a Person indicted.

To the Constable of and to all other peace officers in the said [*county*] of

Whereas it hath been duly certified by *J. D.*, clerk of the indictments on the circuit [*or* clerk of the peace of and for the [*county*] of] [that, *&c., stating the certificate*]: These are therefore to command you, in Her

Majesty's name, forthwith to apprehend the said *A. B.*, and to bring him before [*me*], or some other justice of justices of the peace in and for the said [*county*], to be dealt with according to law.

Given under my hand and seal, this day of in the year of our Lord at in the [*county*] aforesaid.

J. S. (L.S.)

(T.)

Warrant of Commitment of a Person indicted.

To the Constable of and to the Keeper of the [common gaol *or* house of correction] at in the said [*county*] of

Whereas by [*my*] warrant under my hand and seal, dated the day of after reciting that it had been certified by *J. D.* [*&c., as in the certificate*], [*I*] commanded the constable of and all other peace officers of the said county, in Her Majesty's name, forthwith to apprehend the said *A. B.*, and to bring him before [*me*], the undersigned, [*one*] of Her Majesty's justices of the peace in and for the said [*county*], or before some other justice or justices of the peace in and for the said [*county*], to be dealt with according to law: And whereas the said *A. B.* hath been apprehended under and by virtue of the said warrant, and being now brought before [*me*], it is hereupon duly proved to [*me*] upon oath that the said *A. B.* is the same person who is named and charged in and by the said indictment: These are therefore to command you the said constable, in her Majesty's name, forthwith to take and safely convey the said *A. B.* to the said [*house of correction*] at in the said [*county*], and there to deliver him to the keeper thereof, together with this precept; and I hereby command you the said keeper to receive the said *A. B.* into your custody in the said house of correction, and him there safely to keep until he shall be thence delivered by due course of law.

Given under my hand and seal, this day of in the year of our Lord at in the [*county*] aforesaid.

J. S. (L.S)

(U.)

Warrant to detain a Person indicted who is already in Custody for another Offence.

To the Keeper of the [common gaol *or* house of correction] at in the said [*county*] of

Whereas it hath been duly certified by *J. D.*, clerk of the indictments on the circuit [*or* clerk of the peace of and for the county of], that [*&c., stating the certificate*]: And whereas [*I am*] informed that the said *A. B.* is in your custody in the said [*common gaol*] at aforesaid, charged with some offence or other matter; and it being now duly proved upon oath before [*me*] that the said *A. B.* so indicted as aforesaid, and the said *A. B.* in your custody as aforesaid, are one and the same person: These are therefore to command you, in Her Majesty's name, to detain the said *A. B* in your custody in the [*common gaol*] aforesaid until by Her Majesty's writ of habeas corpus he shall be removed therefrom for the purpose of being tried upon the said indictment, or until he shall otherwise be removed or discharged out of your custody by due course of law.

Given under my hand and seal, this day of in the year of our Lord at in the [*county*] aforesaid.

J. S. (L.S.)

(V.)

Whereas at the session of the peace for the county of held on before and others their fellows [*or* at the session of oyer and terminer and gaol delivery held for the county of on before, among others, Sir *A. B.*, knight, one of the justices of the Court of and *here name the quorum Commissioners, justices of oyer and terminer and gaol delivery*], *A. B.*, late of [*labourer*], having been found guilty of felony, and judgment thereupon given, that [*state the substance*] the Court before whom he was tried reserved a certain question of law for the consideration of the

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justices of either Bench and the Barons of the Exchequer, and execution was thereupon respited in the mean time: This is to certify, that the said justices and barons having met in the Exchequer Chamber at Westminster on the day of it was considered by the said justices and barons there that the judgment aforesaid should be annulled, and an entry made on the record, that the said *A. B.* ought not, in the judgment of the said justices and barons, to have been convicted of the felony aforesaid, and you are therefore hereby required forthwith to discharge the said *A. B.* from your custody.

To the gaoler of and the sheriff of and all others whom it may concern.

(Signed) *E. F.*,
Clerk of the peace for the county of
[*or* clerk of assize for *as the case may be*].

We humbly submit this, the Fifth Report of the Commissioners, to Your Majesty's Royal consideration.

HENRY BELLENDEN KER. (L.S.)
ANDREW AMOS. (L.S.)

Received the 13*th day of July*, 1849.
COTTENHAM, C.

London: Printed by William Clowes and Sons, Stamford Street,
For Her Majesty's Stationery Office.

FIFTH REPORT

FROM

HER MAJESTY'S COMMISSIONERS

FOR

REVISING AND CONSOLIDATING

THE

CRIMINAL LAW.

Appointed the 22nd day of February 1845.

Presented to both Houses of Parliament by Command of Her Majesty.

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET.
FOR HER MAJESTY'S STATIONERY OFFICE.

1849.